17-5-57

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 192.

MILLS COUNTY, IOWA, PLAINTIFF IN ERROR,

vs.

THE CHICAGO, BURLINGTON AND QUINCY RAILROAD COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

FILED MARCH 6, 1880.

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a Supreme court of Iowa.

Hon. Joseph M. Beck, chief justice; Hon. Austin Adams, Hon. Wm. H. Seevers, Hon. James H. Rothrock, Hon. James G. Day, justices; E. J. Holmes, clerk.

b THE CHICAGO, BURLINGTON & QUINCY Railroad Co., app'l't, *vs.* MILLS COUNTY, IOWA. } Appeal from Mills district court.

Be it remembered that heretofore, to wit, on the 31st day of August, 1876, there was filed in the office of the clerk of the supreme court of Iowa the abstract of appellant, together with the appellant's abstract in case of Mills County, Iowa, vs. The Burlington & Missouri River R. R. Co., in words and figures following, to wit:

c In supreme court of Iowa. September term, 1876.

THE C., B. & Q. R. R. CO., APPELLANT, *vs.* MILLS COUNTY, APPELLEE.

Appeal from the Mills County district court.

Hale, Stone & Proudfit for appellant; Solomon, Ross & Lawrence for appellee.

APPELLANT'S ABSTRACT.

1 In supreme court of Iowa. September term, 1876.

THE C., B. & Q. R. R. CO., APPELLANT, *vs.* MILLS COUNTY, APPELLEE.

Appeal from the Mills County district court.

Hale, Stone & Proudfit for appellant; Solomon, Ross & Lawrence for appellee.

Appellant's abstract.

On May 15th, 1875, the plaintiff filed in the Mills County district court a petition in the words and figures following:

In the district court of Mills Co., Iowa, Sept. term, '75.

THE CHICAGO, BURLINGTON & QUINCY R. R. CO. *vs.* MILLS COUNTY, IOWA.

Your petitioner, The Chicago, Burlington & Quincy Railroad Co., a

body corporate, organized under the laws of the State of Illi-
2 nois, respectfully states that in the month of July, 1868, a suit was pending in the Supreme Court of the United States on appeal from the supreme court of the State of Iowa, wherein Mills County was plaintiff and the Burlington & Missouri River Railroad Company was defendant; that there was involved in said cause the title to certain lands in Mills County, Iowa; that for the purpose of putting an end to further litigation and delay in said cause, the board of supervisors of said county did, on the 13th day of July, 1868, submit to said B. & M. Railroad Co. a proposition for a settlement and compromise of the matters in controversy therein, a copy of which said proposition is hereto attached, marked Exhibit C, and made a part hereof. That on the 27th day of October, 1868, the said B. & M. Railroad Co. duly accepted of said proposition of settlement and compromise, and gave due notice in writing of their acceptance as aforesaid, and in Nov. 1868, the said proposition was duly approved and confirmed by said board and ordered to be spread upon the records of said board, which was done. That by the terms of said contract said County of Mills, agreed among other things, on account of the considerations therein named to pay the sum of ten thousand dollars, which it has hitherto wholly failed to do, though often requested. Your petitioner further alleges that said B. & M. R. R. Co. did do and perform all of the conditions and obligations which it agreed to do and perform by and under said contract of settlement and compromise, and also that said Mills County has done and performed all the conditions and obligations it agreed to do and perform by and under said contract of settlement and compromise, except the payment of the ten thousand dollars, with interest, for which this suit is brought. That there is now due on said contract from Mills County, the sum of ten thousand dollars, with interest thereon at the rate of six per cent. per annum from November 1st, 1868. That since the execution and confirmation of said contract by said county and the B. & M. Railroad Co., to wit: On the 31st day of December, 1872, said B. & M. Railroad Co. among other things, sold, transferred, assigned and set over unto your petitioner herein the contract and claim for said ten thonsand dollars and interest thereon, against said Mills County, as provided and agreed to be paid by said contract, and the same is
3 now the property of this plaintiff, all other portions, obligations, and conditions of said contract having been duly complied with and performed by the parties thereto.

Your petitioners therefore ask judgment against Mills County for the sum of ten thousand dollars, with interest thereon at the rate of six per cent. per annum from November 1st, 1868, and for costs of suit.

HALE, STONE & PROUDFIT,
Attorneys for Plaintiff.

Said petition was duly verified as the law directs.

4 EXHIBIT C.

In order to settle and finally adjust the lawsuit now pending in the Supreme Court of the United States, wherein Mills County, in the State of Iowa, is plaintiff, and the Burlington and Missouri River Railroad Company is defendant, and secure the completion of said road through

Mills County, via Glenwood, in said county, we, the undersigned, agents of said county, submit the following proposition to the board of directors of said railroad company, to wit:

There are in dispute between the parties to the said lawsuit twenty-three thousand three hundred and sixteen acres. For the purpose of having our proposition understood, we acknowledge that we owe you acres of land to the amount of 23,316; to pay which we have and offer you odd sections, vacant (most of which is a part of the 23,316 acres, and even sections patented to the county and unsold, in the aggregate 9,080 acres; balance of the land due you, 14,236 acres. For further payment we have and offer to you of the odd sections (about all of which is of the 23,316 claimed by you), subject to pre-emption made through the county, acres to the amount of (on which nothing has been paid to the county) 4,660. Of these pre-empted lands we estimate that about one-half of the pre-emptions are fraudulent, and ought not to be recognized, but the county must ask that where bona-fide improvements have been made on the same, the pre-emptors must be secured in their right to the same, and have the privilege of purchasing at $1.25 per acre of the county or company, which amount shall, in any event, go to the railroad company. Now you will have land for land, subject only to the pre-emptor's claims, until there will be due you in acres 9,576.

The remainder, 9,576 acres, belong to bona-fide settlers and purchasers, who, we must insist, shall be protected by the county. And as we have paid you all the land we have, we offer you for this balance ten thousand dollars in money.

The company should understand that the balance of 9,576 acres is the land, portions of which it has been settling with our individual citizens for, and there is included in the 9,576 acres all the lands the company has sold to citizen settlers at $1.25 per acre. With this understanding, the $10,000 balance we offer you will be just as much less than 9,576 acres as the company has thus sold, and therefore our pay would perhaps amount to $1.50 or more.

It is understood that the said suit now pending shall be continued, by agreement of the parties, from term to term, until the conditions of this contract or proposition shall be complied with.

It is also further understood that the foregoing proposition shall not be binding on the County of Mills, unless said railroad company shall complete said railroad through Mills County via Glenwood and build a depot at Glenwood, in said county, and in case said railroad company shall fail or neglect to build said railroad through Mills County, via Glenwood, and also to build and establish a depot at Glenwood, in said county, then, and in that event, the said lawsuit shall stand for final hearing in the Supreme Court of the United States, the same as if this proposition had never been made. In case the suit shall be settled on the basis of this proposition, each party shall pay their own costs. The manner of transferring the land, whether the county shall deal with the purchasers and pre-emptors, or whether the railroad company under the restrictions indicated, the county is not particular about, but will agree to what may seem most practicable.

The amount in acres, as stated above, may not be exactly correct and probably is not, but it is believed to be nearly so, but we wish it under-

stood that the company shall have all the swamp lands the county now hold or is entitled to in Mills County, Iowa, subject only to the conditions indicated in the foregoing. Witness our hands this July 13, 1868.

WM. HALE,
E. C. BOSBYSHELL,
D. H. SOLOMON,
L. W. TUBBS,
Majority of the Committee.

BURLINGTON, IOWA, *October* 27, 1868.

This proposition is hereby accepted, and the terms and stipulations and conditions are agreed to by the Burlington and Missouri River Railroad Company.

BURLINGTON AND MISSOURI RIVER RAILROAD COMPANY,
By C. E. PERKINS, *Supt.*

Notice of the acceptance of the within proposition by the Burlington and Missouri River Railroad Company has been served on us this 31st day of October, 1868.

D. H. SOLOMON,
E. C. BOSBYSHELL,
WM. HALE,
L. W. TUBBS,
Committee.

6 EXHIBIT D.

To the board of supervisors of Mills County:

The undersigned, appointed by the board of supervisors of Mills County, Iowa, to settle, adjust, and compromise the suit in relation to swamp lands in Mills County, Iowa, wherein Mills County, Iowa, is plaintiff, and the Burlington and Missouri River Railroad Company is defendant, beg leave to report that in accordance with the authority and powers vested in us by your honorable body, we proceeded to the city of Burlington, Iowa, and there submitted to said railroad company the proposition hereto appended, and which was, on the 31st day of October, 1868, accepted by said railroad company, and which we now submit to your honorable body for approval and ratification.

Respectfully submitted, November 9th, 1868.

(Signed) E. C. BOSBYSHELL.
WM. HALE.
D. H. SOLOMON.
L. W. TUBBS.

After giving the report due consideration, it is resolved by the board of supervisors of Mills County, Iowa, at their regular session in November, 1868, that the proposition submitted to the Burlington and Missouri River Railroad Company by our special railroad committee, and the acceptance of the same by the said company be, and the same is, hereby, confirmed and ratified, and that the same be spread upon the records of this board.

The ayes and nays being called for, the vote stands as follows:

Ayes—Allis, Forrester, Haynie, Lamb, Utterback, Wing, Ward, Russell, Summers, and Mr. Chairman. Nays none.

7 That on the 9th day of September, 1875, the defendant filed a

motion for a more specific statement, requiring plaintiff to state whether the sale, transfer, and assignment of the contract sued on was in parol or by writing, and if by writing, then that a copy of such writing be annexed to the petition; which motion was sustained, and plaintiff had leave to amend.

On Sept. 17th, 1875, plaintiff, by leave of court, filed an amendment to the original petition, alleging that said contract of sale and assignment was in writing, and attaching a copy of the said transfer thereto as Exhibit B. Said contract of sale and transfer so attached to said amendment is in the words and figures following, to wit:

EXHIBIT B.

This indenture of lease and agreement, concluded this 31st day of December, A. D. one thousand eight hundred and seventy-two (1872), by and between the Burlington and Missouri River Railroad Company, a corporation organized under the laws of the State of Iowa, of the first part, and the Chicago, Burlington and Quincy Railroad Company, a corporation created and organized by and under the laws of the State of Illinois, of the second part.

Whereas the Chicago, Burlington and Quincy Railroad Company is the owner of and maintains and operates a main line of railroad extending from Chicago to Burlington, and is also the owner of various other lines of railroad, both main and branch, situated in the States of Illinois and Iowa, with their appurtenances, and the Burlington and Missouri River Railroad Company is the owner of a main line of railroad extending from the city of Burlington to a point on the Kansas City, St. Joseph and Council Bluffs Railroad, about fifteen miles from Council Bluffs, Iowa, and in virtue of a leasehold from that company runs its trains over that road into Council Bluffs, and it is also the owner or lessee of certain branch railroads connecting with its main line, which it maintains and operates, with their appurtenances, all situated within the State of Iowa; and

8 Whereas said main lines of railroad of said companies, as now constructed and operated, constitute one continuous line of railroad from Chicago, by way of Burlington, to Plattsmouth and Council Bluffs, on the Missouri River, and it is believed to be for the mutual interest of the two companies that the same should be owned, maintained, and operated by a single corporation, and that to secure this end, the stock, property, rights, privileges, and franchises of the one should be managed and controlled by the other; and

Whereas, with this view, meetings of the respective boards of directors of said corporations were duly called and held on the third day of October, A. D. eighteen hundred and seventy-two (1872), at which the lease and agreements herein contained were considered and agreed upon, subject to ratification by the stockholders of said companies, respectively, and as a part of such agreement, it was arranged that the share values of the respective stocks should be equalized by the distribution, by the said second party, of twenty-five per cent. on the capital stock in the seven per cent. bonds of this company to its stockholders; and afterwards, at meetings of stockholders of said respective corporations duly called and held for that purpose, the terms of said lease and agreements were approved and ratified, and the execution of this instrument recommended; and at previous meetings of said respective boards of directors, the presidents and

secretaries of said companies were directed to execute this agreement and carry the same into effect, provided the same should be ratified by the stockholders as aforesaid:

Now, therefore, this instrument witnesseth that the party of the first part, to accomplish the object aforesaid, and in consideration of the stipulations and agreements herein contained, to be kept and performed by said second party, has granted, demised and leased, and does hereby grant, demise and lease, in perpetuity, to the said party of the second part, its successors and assigns forever, all and singular its railroad situated in the State of Iowa, extending from Burlington, on the Mississippi River,
9 to Plattsmouth, on the Missouri River, constructed and to be constructed, and all branches connected therewith, owned or controlled by it, all rights of way, depot and other lands or interests therein connected with said railroad or branches, all station houses, shops, offices, and other buildings and structures of whatsoever kind belonging thereto or used in connection therewith, together with all fixtures and appurtenances belonging to said railroad, branches, or other property, or in any manner connected therewith; all the equipments of said railroad and branches, including engines, cars, and all other rolling-stock, and all tools, machinery, materials, and every other matter or thing connected with the equipment of said railroad or branches; all rights, privileges, and franchises of said party of the first part in and to the aforesaid railroad, branches, or other property now held, used, or controlled by it, or which it may hereafter acquire or become entitled to, together with all other property of every kind and description belonging to or appurtenant to said railroad, branches, and to other property, and its right, title, and interest in and to the same and to every part thereof.

And the said party of the first part also, for the aforesaid considerations, hereby grants, bargains, sells, assigns, and transfers to said second party, its successors and assigns, all the lands heretofore granted to it by the general government now remaining unsold, and amounting to about two hundred thousand acres, more or less, and all other the lands and real estate of said first party owned or possessed by it, or to which it may be or become entitled, and all title and interest it may have therein; all contracts, evidences of indebtedness received or held for land heretofore sold by said party of the first part; also all moneys, notes, accounts, evidences of debt, choses in action, and all other the personal property of said first party of whatsoever kind and wheresoever situated. Also all leases of branch roads or connecting roads, or any part thereof, now held and possessed by said party of the first part.

To have and to hold the said leasehold premises, railroad branches,
10 rights, privileges, and franchises in perpetuity, as aforesaid, and said lands and interests in real estate, leases, moneys, contracts, evidences of debt, choses in action and other property above mentioned or intended to be conveyed hereby to said party of the second part, its successors and assigns, for ever, as fully in all respects as said party of the first part might have held, used, controlled, or enjoyed the same had this instrument not been made, with full power and authority to collect, receive, have, and use all the rents, proceeds, profits, and income thereof, and all moneys and revenues to be derived therefrom, and appropriate the same in such manner as it or they may deem best, and as shall be consistent with the interests hereof, with full authority to the said second party, in

the management and disposition of the railroad and property herein mentioned, to use the name and seal of said first party as full in all respects as it could do had this instrument not been made.

And the said first party also agrees to keep up its corporate organization until the complete and absolute union and consolidation of the stock and properties of the two companies, as contemplated by the parties, shall be effected, the cost of the maintenance of such organization, however, to be paid by the second party.

The said party of the second part, in consideration of the premises, does hereby covenant and agree with the said party of the first part, its successors and assigns, to take immediate possession of said demised railroad and other property herein granted, and to keep said railroad and branches equipped, and maintain and operate the same in such manner as to furnish reasonable accommodations to the public; to pay or cause to be paid all taxes or assessments that may be lawfully levied, charged, or assessed on said railroad and property or any part thereof; to assume all leases, contracts, bonds, and other obligations of whatsoever kind; to pay and discharge all debts and liabilities of every nature, both principal and interest, of said party of the first part as they shall severally mature; to make to the stockholders of said party of the first part and to the stockholders of its respective branches the same and same amount of dividends per share that it shall make to its own stockholders, and also to grant and secure to them respectively the same benefits and emoluments of every description that its own stockholders may receive, have, or become entitled to.

11

Provided, however, that the holder of any of the convertible bonds of said first party who may elect to convert the same, and thus become a party to this arrangement, shall receive, by way of dividend on the stock obtained by such conversion, only such pro rata proportion of any dividend declared next after such conversion as the interval between the date of such conversion and the date of the payment of such dividend bears to the interval between the last dividend of said corporation and the one in which the party so converting may be entitled to participate, and the certificate of stock to be issued on such conversion shall be qualified accordingly.

It is hereby mutually agreed by and between the parties hereto to execute and deliver such further conveyances, papers, and authority as counsel shall deem necessary to more completely effect the objects sought, and to carry out the intention of the parties to this instrument.

In witness whereof the parties hereto have caused this instrument to be signed by their respective presidents, and their respective seals to be hereto attached, and attested by their secretaries, the day and year first above written.

BURLINGTON AND MISSOURI RIVER RAILROAD COMPANY,

{ BURLINGTON AND MISSOURI R. R. R. CO. SEAL. } (Signed) By J. W. BROOKS, *President.*

Attest:

J. N. DENISON, *Ass't Secy.*

CHICAGO, BURLINGTON AND QUINCY RAILROAD COMPANY,

{ CHICAGO, BURLINGTON AND QUINCY RAILROAD CO. } (Signed) By J. M. WALKER, *President.*

Attest:

A. T. HALL, *Secretary.*

12 STATE OF MASSACHUSETTS,
County of Suffolk, ss:

Be it remembered that on this fourth day of January, A. D. 1873, before me, a notary public residing in the city of Boston, county of Suffolk, and State of Massachusetts, duly commissioned by the governor of the State of Massachusetts to take acknowledgments and proofs of deeds and other instruments in writing, under seal, to be used or recorded in the State of Iowa, personally came J. W. Brooks, president of the Burlington and Missouri River Railroad Company, who is known to me to be the person whose name is signed to the foregoing instrument, who, being by me duly sworn, deposes and says that he resides in the town of Milton, in the county of Norfolk, and State of Massachusetts; that he is president of the Burlington and Missouri River Railroad Company; that he knows the corporate seal of said company; that the seal affixed to the foregoing instrument is the corporate seal of said company; that it was affixed by order of said company, and that he signed his name to said instrument by like order as president of said company, and acknowledged that he executed and delivered the said instrument as his free and voluntary act for the uses and purposes therein set forth, and that said company also executed said instrument as its free and voluntary act for the uses and purposes therein set forth.

CHARLES D. DORMAN, NOTARY PUBLIC, SUFFOLK CO., MASS. } In witness whereof I have hereunto set my hand and official seal this fourth day of January, A. D. 1873.

(Signed) C. D. DORMAN, *Notary Public.*

13 On the 17th day of September, 1875, the defendant filed a motion setting forth that there were two actions pending herein which might have been joined, viz: No. 817, equity, wherein Mills County, Iowa, is plaintiff, and the Burlington and Missouri River Railroad Company, the Chicago, Burlington and Quincy Railroad Company, and others were defendants, and this cause, law No. 927. Wherefore said Mills County moved that the Chicago, Burlington and Quincy Railroad Company show cause why said No. 927 law should not be consolidated with said No. 817 equity, and in support of said motion reference was duly made to the record in each of said cases then pending in said district court; and,

On the 20th day of September, 1875, defendant, Mills County, filed a motion to transfer this action to equity side of the court, and as grounds of such motion suggested that the answer herein sets up an equitable defense which this court can only determine by sitting as a court of equity, and further asking that this cause be consolidated with No. 817 and that this motion be considered in connection with the motion to consolidate filed heretofore, on the 17th of September, 1875.

And afterwards, said motions to consolidate and transfer came up for hearing, and the court, after argument on the same, made ruling and order in the words following, to wit: "Now, on this day this cause comes on to be heard, and on the motion of defendant to require the plaintiff to show cause why this cause should not be consolidated with the cause No. 817, on the equity calender, wherein this defendant is plaintiff and The B. & M. R. R. R. Co. and others are defendants, and said motion being con-

sidered by the court, and no good reason being shown why such consolidation should not be made, it is ordered that this cause be consolidated with said cause No. 817 on the equity calender. To all which plaintiff excepts."

14 On September 28th, 1875, the defendant filed an answer, which is in the words and figures following, to wit:

Answers and cross petition.

In the district court of Mills County, Iowa. Sept. term, 1875.

THE CHICAGO, BURLINGTON & QUINCY R. R. Co.
vs.
MILLS COUNTY, IOWA.

The defendant, Mills County, Iowa, answering the plaintiff's petition in the above-entitled cause, states:

1st. That the defendant denies each and every allegation contained in the plaintiff's petition, which is not hereinafter admitted or that may be in any manner inconsistent with the statements hereinafter made in this answer.

2nd. The defendant denies that she owes the plaintiff anything either for and on account of the causes and grounds of action set forth against her in the plaintiff's petition, or for any other cause or causes, ground or grounds of action.

3d. As to whether the plaintiff is a body corporate organized under the laws of the State of Illinois, the defendant denies any knowledge or information thereof sufficient to form a belief.

4th. The defendant admits that in the month of July, 1868, there was a suit pending in the Supreme Court of the United States, an appeal from the supreme court of the State of Iowa, wherein Mills County was plaintiff and the Burlington and Missouri River Railroad Company was defendant, and that there was involved in said suit, questions which did pertain to and in some degree affect the title to certain lands in Mills County, Iowa. But she owns that said lands, a list of which is hereto annexed and marked Exhibit A, were lands granted by Congress to the State of Iowa, by an act of Congress approved on the 28th day of September, 1850, and entitled "An act to enable the State of Arkansas and other States to reclaim the swamp lands within their limits," and which by a subsequent act of Congress entitled "An act to confirm to the several States the swamp and overflowed lands selected under the act of September 28th, 1850, and the act of the second of March, 1849," approved March 3d, 1857, were confirmed to the State of Iowa, and which and
15 by an act of the general assembly of the State of Iowa, entitled "An act to dispose of the swamp and overflowed lands within this State and to pay the expenses of selecting and surveying the same," passed January 13th, 1853, and other acts of said general assembly supplementary thereto, been granted by the State of Iowa to Mills County as a property to be held for the purpose and uses applied by said Mills County for the purpose of draining and reclaiming the swamp and overflowed

lands within her limits. That the title in fee to said lands did rest in the State of Iowa at the date of the passage of the act of Congress first above set forth, to wit, the 28th day of September, 1850, in trust and for the purposes above stated, but nevertheless and notwithstanding these facts and in total disregard of them the said Burlington and Missouri River Railroad Company did by some means succeed in procuring from the Commissioners of the General Land Office of the United States certificates for said lands as enuring to them under certain railroad grants. That the validity of these certificates and all rights in and to said lands were put in issue in said suit, and that after a full hearing of all the facts the district court of Mills County, Iowa, did declare the claim of said railroad company to be void and that the right and title to said lands was in Mills County, Iowa, by a decree rendered on the day of , 18 , a copy of which is hereto annexed and marked Exhibit B, and made a part of this answer. That the said Burlington and Missouri River Railroad Company did appeal from said judgment and decree so rendered, to the supreme court of Iowa, and that said judgment and decree of the district court of Mills County, Iowa, was, on said appeal, at the June term, 1867, of said supreme court of the State of Iowa, affirmed, and that though said cause had been in July, 1868, removed to the Supreme Court of the United States by the said Burlington and Missouri River Railroad Company by writ of error, still said judgment of the supreme court of Iowa, so rendered as aforesaid, was then a valid and subsisting judgment, and had not then been in any manner altered, vacated, modified, or changed, and was not in any manner affected or suspended or superseded as a valid and subsisting judgment, by the pendency of said writ of error in the Supreme Court of the United States. That the lands so in dispute and con-
16 tained in Exhibit A hereto attached, did not embrace all of the swamp lands of Mills County, Iowa, but were only the alternate and odd numbered sections, falling within certain limits, and that at the date of the instrument attached to plaintiff's petition as Exhibit C thereto, to wit, July 13th, 1868, Mills County owned other swamp lands than those contained in said Exhibit A.

5th. That by an act of Congress entitled "An act making a grant of lands to the State of Iowa in alternate sections, to aid in the construction of railroads in said State," approved May 15th, 1856, certain lands, interests, rights, powers, and privileges were thereby conferred upon the State of Iowa to aid in the construction of a railroad from Burlington, on the Mississippi River, to a point on the Missouri River near the mouth of Platte River, and for other purposes. That so much of said lands, interests, rights, powers, and privileges as were granted and conferred under and in pursuance of said act of Congress to aid in the construction of said railroad, were by an act of the general assembly of the State of Iowa, entitled "An act to accept of the grant and carry into execution the trust conferred upon the State of Iowa by an act of Congress entitled 'An act making a grant of lands to the State of Iowa, in alternate sections, to aid in the construction of a railroad in said State, approved May 15th, 1856,'" which was approved on the 14th of July, 1856, granted and conferred upon the said Burlington and Missouri River Railroad Company which was then, as it is now, a body corporate, created by and existing under the laws of the State of Iowa.

That the said Burlington and Missouri River Railroad Company did within 90 days after the passage of said last-mentioned act of the Iowa general assembly assent to and accept the provisions of said act in the manner in which they were by said act required to do. That under and by virtue of these acts and grants of lands and other acts and grants both by the general assembly of the State of Iowa and the Congress of the United States the said Burlington and Missouri River Railroad Company has had and received acres of lands donated to them for the purpose of aiding them in the building and completing of their said railroad other than the lands described in Exhibit A thereto.

17 That in order to fix and designate the particular parcels and tracts of the public lands that were to be covered by and embraced in said land grant the line and route of said road was required to be definitely fixed and located, and by the Iowa act on or before the first day of April next after the passage thereof, and plaintiff avers that the final location of the line and route of said railroad through the county of Mills as well as every other county through which it passed, was duly, legally, and definitely fixed and determined so as to secure to said Burlington and Missouri River Railroad Company the said lands, interests, powers, and privileges to them granted and conferred as is above stated, and on the 27th day of March, 1857, and that thus the said Burlington and Missouri River Railroad Company become by such acceptance and location bound under the obligation of a contract to the State of Iowa and to all the people and citizens thereof, and more especially to those of the county of Mills, to build and construct its said railroad on said line and routes through the county of Mills as well as all the other counties through which it passed. That notwithstanding the said solemn contract with the State of Iowa and the said magnificent grant of lands it had received to enable it to build and construct their said railroad on the line and route so definitely fixed as is herein above stated, said Burlington and Missouri River Railroad Company, prior to the commencement of work upon their road-bed in Mills County, through its officers, agents, and parties in its interests by means of and by pretending to change its original articles of incorporation, so as to permit of two or more points of accommodation on the Missouri River in place of one point, as fixed in its original articles, and by scare and mock lines, and other fraudulent devices and pretences, such as saying and causing it to be reported, and feared at least, if not believed, that the company were going to construct the road above or below Mills County, and not centrally through it on their own old surveyed route, and this because the county had shown hostility to them by sueing them, referring to the suit above described, and other sayings and hints to the same or similar effect, resorted to for the purpose of creating fear and alarm in the minds of the people of Mills County, and espe-

18 cially the members of the board of supervisors, lest the county would lose the road, and thus be deprived of its just rights and expectations under which its settlements and improvements had been made for the ten years then past, did threaten that unless other inducements were offered and given to them the company would abandon its said fixed line and route through Mills County, and go to other rival points above and below said line, and so the defendant admits that its then board of supervisors, influenced and alarmed by said fraudulent practices, did entertain the propo-

sition for a contract, which is attached to the plaintiff's petition as Exhibit C thereto. But they deny that said proposition for a contract was for the purpose, as is alleged in the plaintiff's petition, *for the purpose* of putting an end to further litigation and delay in said cause, but aver that said proposition for a contract was entertained by its said members of its board of supervisors for the purposes which are expressed in the instrument itself, "To secure the completion of the Burlington & Missouri River Railroad through Mills County, a proposition to devote swamp lands to the building of a railroad in Mills County."

6th. The defendant says that she is in no manner bound by said instrument, a copy of which is attached to the plaintiff's petition as Exhibit C, and says that the same is not her act and contract, and that she is in no manner bound thereby; that the offer of ten thousand dollars therein made is not their offer, and she denies that the board of supervisors of Mills County had any right, power, or authority to make such a contract as is Exhibit C for her, and especially does she deny their right to bind her to pay the sum of ten thousand dollars by any such contract; she denies that she agreed among other things *a*n account of the considerations named in said instrument to pay the sum of ten thousand dollars, for she says that said proposition is and ever has been void as a contract against her, this defendant, because she says that the lands which were the subject-matter thereof had under and by virtue of the statutes above cited became invested in her as a trust property as early as the year 1853, for the purpose of draining and reclaiming the swamp and overflowed lands within her limits, as swamp lands, and this was a proposition to devote the same, and ten thousand dollars in money, to the making of a railroad through Mills County,
19 and none of said lands or proceeds thereof could be devoted without the question whether the same should be so devoted shall have been first submitted at some general or special election to the people of the county and she says that the same was not so submitted until the September meeting of the board of supervisors of Mills County, Iowa, in the year 1871; and she says that at the September meeting an order for the submission of said contract between Mills County and the Burlington & Missouri River Railroad Company (a copy of which is thereto attached and marked Exhibit C) to the voters of Mills County, Iowa, at the ensuing general election to be held on the 10th day of October, 1871, submitting to them the question whether the amount of swamp land specified in said contract and the proceeds thereof to the amount of ten thousand dollars should be devoted to the purposes set forth in said contract was made, and she avers that said order of submission was duly complied with and the vote was duly taken as directed, and that there were thirteen hundred and eighty-eight votes cast at said election for and against affirming said contract so submitted, and there was cast for affirming but three hundred and fifty-seven (357) votes, while there were ten hundred and thirty-one (1031) votes cast against affirming said contract, so they aver that said proposition and contract was defeated, rejected, and repudiated by Mills County, Iowa, and that she refused to ratify and affirm the same at the first opportunity which was afforded her of passing upon the same in the manner provided by law, and she avers that she has never assented thereto, but has refused to assent thereto.

7th. The defendant states further that the instrument Exhibit C at-

tached to the plaintiff's petition was not a compromise of the suit which was then pending in the Supreme Court of the United States, as is stated and claimed in the plaintiff's petition, for they say that notwithstanding said instrument said cause was allowed to come on to be heard in the said Supreme Court of the United States on the transcript of the record from the supreme court of the State of Iowa, and was argued by counsel, and that on consideration whereof it was by said court, on the 7th day of February, 1870, ordered, adjudged and decree' that the decree of the said supreme court in said cause be and the same was affirmed, with
20 costs, as will more fully appear by reference to the docket and record entry of the said Supreme Court, a copy of which is hereto attached and marked Exhibit D, and made a part of this answer.

8th. The defendant denies that she has done and performed any of the conditions of said proposition for a contract. She admits that certain deeds for a large amount of the swamp lands have been signed and delivered to the defendant by persons claiming to act for her as a board of supervisors, but she says that said deeds are not hers, and that she has repudiated them, and that she has instituted suit which is now pending and undetermined in this court of equity, asking to have such conveyances declared null and void; she denies that she has ever executed and confirmed said contract.

9th. She denies that the Burlington and Missouri River Railroad Company has done and performed anything in performance of said proposition, except such acts as they were in duty bound and in law ought to have done and performed had no such instrument have been drawn.

10th. She says said instrument is and has ever been without any consideration, and that she has never received any consideration for anything that is claimed from her under and in pursuance of said instrument, Exhibit C, and avers specially that she has never received any consideration whatever for the supposed promise to pay $10,000 contained in said instrument.

11th. She states that there are thousands of acres of swamp and overflowed lands within the limits of Mills County, Iowa, that are not reclaimed and that all the swamp lands and all of the proceeds of the sales thereof are needed for the purpose of draining and reclaiming the same, and constructing the necessary levees and drains to reclaim the same, and that some levees and drains have been constructed by private enterprise in consequence of a lack of swamp land funds to do so with.

11th. She states that the question upon the promise to pay the said ten thousand dollars which is declared on in the plaintiff's petition has never been submitted to the people of Mills County for a vote thereon,
21 and has never been authorized and sanctioned by any such vote, as the law requires, and is contrary to the statute and public policy.

12th. She states that the ten thousand dollars and even sections embraced in said Exhibit C in plaintiff's petition were in no manner embraced in the former suit then pending in the Supreme Court of the United States, and that the whole of that which is pretended to be claimed of this defendant, to wit, the swamp land, is and was a trust property, and there was no power in the board of supervisors to so surrender the whole of said property in a pretended compromise of said suit, and that as a compromise said proposition was and is unjust and unfair in all its parts, illegal

and inequitable, and that she ought not in conscience to be bound by it or to be made specifically to perform the same.

13th. She further says that said proposition, to wit, the instrument, Exhibit C to plaintiff's petition, if considered a contract, is void as such, and ought not to be enforced as against her, because she says the same was, if a contract at all, an entirety, and that the considerations and inducements for the promise claimed as against this defendant are not severable, and that one, to wit, the building of a railroad, was and is illegal, without popular sanction at an election.

14th. She further states that there is now a former action pending in this court in equity, entitled Mills County, Iowa, plaintiff, vs. The Burlington and Missouri River Railroad Company et al., defendants, which was commenced on the 29th day of January, 1874, in which the invalidity of the instrument, Exhibit C to plaintiff's petition, is asserted by plaintiffs, and in which the chief object sought by the plaintiff is to have said instrument in all its parts declared to be and have been null and void as against this defendant, and that this plaintiff has appeared in said action, and had so appeared long prior to the institution of this suit, and filed therein its answer as a party thereto, putting in issue directly the validity of said instrument, which answer was filed by the plaintiff in said former action on the 13th day of April, 1875; all of which will the
22 more fully appear, reference being had to the record and proceedings of said former action, which is still pending and undetermined in equity in this court, which are referred to and asked to be considered as a part of this answer, and so she says that the pendency of said former action is and should be considered and treated as a bar to this action, and this action should therefore be dismissed for that reason; for which the defendant here prays.

The defendant, in view of the premises and of the facts herein above set forth, asks that this her answer shall be treated not only as her answer to the plaintiff's petition, but as a cross-petition in equity, and that this court may, as a court of chancery, consider the same and declare that she, the defendant, is not bound by said instrument, Exhibit C to plaintiff's petition; that the same is not and never was her contract; that the board of supervisors had not power to make and bind her thereby; that the same is and was unjust, illegal, and void, and that the plaintiff shall hold nothing in this action, and for such other and further relief as to the court may seem proper, with judgment for the costs herein expended.

C. B. LAWRENCE,
L. W. ROSS,
D. H. SOLOMON,
Attorneys for the Def't.

23 EXHIBIT D No. 39.

Supreme Court of the United States, December term, 1859.

THE BURLINGTON AND MISSOURI RIVER RAILROAD Company, plaintiff in error,
vs.
MILLS COUNTY, IOWA.
} In error to the supreme court of the State of Iowa.

This cause came on to be heard on the transcript of the record from the supreme court of the State of Iowa, and was argued by counsel.

On consideration whereof it is now here ordered, adjudged, and decreed by this court that the decree of the said supreme court in this cause be, and the same is hereby, affirmed, with costs.

7th of February, 1870.

True copy. Attest:

[SEAL.]

D. W. MIDDLETON,
Clerk Sup. Court, U. S.

STATE OF IOWA, *Mills County:*

I, John Barbour, being present, duly sworn, on my oath say that I am a member of the board of supervisors of said Mills County, Iowa; that I am familiar with the matter set forth in the foregoing answer and cross-petition, and that the same are true, as I verily believe.

JOHN BARBOUR.

Sworn to before me and subscribed in my presence by the said John Barbour the 20th September, 1875.

J. SOLOMON,
Notary Public.

24½ On Feb'y 26th, 1876, the court rendered judgment in favor of Mills County, and gave plaintiff 60 days to file bill of exception; to which holding the C. B. & Q. R. R. Co. duly excepted, and on the 20th day of April, 1876, the C. B. & Q. R. R. *R.* filed said bill of exceptions; was signed by the court, and filed by the clerk on April 22nd, 1876. On August 2d, 1876, notice of appeal to the supreme court was duly served and appeal bond filed.

25 ABSTRACT OF THE TESTIMONY.

Testimony of B. F. Buffington.

Is 45 years of age; resided in Mills County 20 years; principal business, that of farming, but now a grain-dealer; was a member of the board of supervisors of Mills County during the years 1861, 1863, 1869, 1870, 1871, and 1872. Was a member of the board during the whole time that the contract of settlement between Mills County and the B. & M. R. R. R. Co. concerning the compromise of a lawsuit about swamp lands was being adjusted and *and* closed up, so far as executing and exchanging deeds was concerned. (Objected to by plaintiff' counsel because incompetent, irrevelant, and immaterial.) The contract of settlement, marked as Exhibit C, to the petition of the C., B. & Q. R. R. Co., was treated and regarded by the board of supervisors during the period of adjustment as a compromise and a final settlement of the matter. (Objected to, same as above.) The deeds made in pursuance of the contract of settlement by the county were made to the B. & M. R. R. R. Co. Cannot say whether all deeds made by the R. R. Co. were made to the county or some of them to individuals.

Cross-examination:

While I was a member of the board the company made a demand of the county, through the board, for money due them under the contract. I do not remember the officer who made the demand, nor the date when it was made. The board ordered a submission of the matter to the people at an election.

I understood that one of the purposes of the instrument marked Exhibit C, before referred to, was in part the building of a railroad through Mills County via Glenwood. I have not myself ever had a dollar's interest in any of the lands. I have two or three friends who have bought some of the lands. I was not a member of the board at the time the contract was made. The question of ratifying said contract was submitted to the people and rejected.

Redirect examination:

26 Question. State whether or not this vote was had after the railroad company had conveyed to the county or to other persons all of the lands which it was to convey under said contract, and after it had complied with all the conditions and obligations which it assumed and agreed to comply with by the terms of the contract.

(Objected to by plaintiff's counsel as leading, suggestive of answer, and calling for the opinion of witness, incompetent, irrelevant, and immaterial.)

Answer. My recollection is when the vote was taken the railroad company had deeded most, if not all, the lands it had agreed to deed under the contract, and, as I understood, the railroad company had fulfilled the condition of the contract on their part.

Ques. Was or was not that the understanding of the board at the time of the submission to the people referred to?

(Objected to same as above.)

Ans. It was, so far as I know.

At the time of submitting the contract to a vote of the people, at the June session, 1871, the B. & M. R. R. R. Co. had executed deeds to most, if not all, the lands they were to convey under the contract, and had built the road through Mills County via Glenwood.

(Objected to by plaintiff's counsel, same as above.)

Recross-examination:

The board had no other authority that I know of for making these deeds of the swamp lands to the B. & M. R. R. R. Co. than the contract of settlement before referred to.

Ques. Now, Mr. Buffington, that instrument provided, among other things that the proposition it contained should not be binding on Mills County, unless the railroad company should complete its road through Mills County via Gleenwood, and build a depot at Glenwood; and in case it should fail or neglect to do so, in that event the lawsuit should stand for final hearing, the same as if the proposition had never been made. Now, would you, as a member of that board, have conveyed the swamp lands in controversy to the railroad without a compliance with that condition, to wit, the building of its road through Mills County via

27 Glenwood?

(Objected to by defendant's counsel because not proper cross-examination, immaterial, and because it seeks the opinion of the witness and does not tend to prove any present or past fact, is entirely speculative, remote, and irrelevant.)

Ans. As a member of the board, I should not have consented to have deeded any of the lands to the railroad company without a full compliance on the part of the railroad company with all the conditions, including that condition.

The contract had not been submitted to a vote of the people at the time of making the deeds.

Testimony of Bennett Creech.

Is 41 years of age; a resident of Mills County, and by occupation a farmer. I was a member of the board. I took my seat as such member January 1st, 1869; I served until the fall of 1872; I was a member of the board during the adjustment of the contract of settlement between Mills County and the B. & M. R. Railroad Co. As far as I understood it, that contract was treated as a settlement and adjustment of the swamp-land question between Mills County and the B. & M. R. R. R. Co., and the settlement was effected while the suit was pending in the courts as to title in the land. I understand that this compromise was made between the railroad co. and the county, by them entering into the agreement marked Exhibit C to the question of the C., B. & Q. R. Co.

The board of supervisors, during the adjustment of said contract, did treat the same as a compromise and final adjustment of the matters in controversy, pending in the Supreme Court of the United States, in a suit between Mills County and the B. & M. R. R. Co. and deeds were made by the B. & M. R. R. Co. to Mills County and also by Mills County to the B. & M. R. R. for at least a portion of the land, for the purpose of carrying out that contract.

Cross-examination:

I was not a member of the board when the contract of compromise was made. The contract was submitted for ratification to a vote in 1871, after the execution of all the deeds except the last one, which was
28 executed by the board at the time the order of submission was made. I was a member of the board at the time of the canvass of the votes on the ratification of the contract.

Ques. State the result of the vote cast at that election?

(Objected to as not proper cross-examination and not best evidence.)

Ans. The majority of the votes cast were against the contract.

I authorize T. P. Ballard to attach a copy of the election record showing this vote to my deposition. I mean by the adjustment of the contract, the subsequent carrying out of the same by the parties.

Redirect-examination:

At the time of the submission to a vote of the people of Mills County, for approval or disapproval of said contract referred to as Exhibit C, the B. & M. R. R. Co. had complied with all of its obligations contained in said contract.

From the time I took my seat as a member of the board, up to the time the question was submitted to a vote of the people it was treated as a compromise and settlement of that swamp-land controversy and had been by both parties carried out in good faith, as far as I know. If it had not been for the conveyance of the lands described in Exhibit E to the answer of the C., B. & Q. R. R. Co. by the B. & M. R. R. R. to Mills County I would not have consented to the the conveyance of the lands in controversy to the B. & M. R. R. Co. If the B. & M. R. R. Co. had

refused to convey the lands falling to bona fide pre-emptors, or to purchasers from the county at $1.25 per acre, under the contract, I would not have consented, as a member of the board, to a conveyance of the lands in controversy. In short, if they had refused to comply with any conditions and obligations which it assumed and agreed to perform under the contract I would not have consented, as a member of the board, to a conveyance of the lands in controversy. The company did comply with all the conditions of the contract of settlement and compromise on its part before there was an order made to submit to a vote of the people.

H. C. Watkins' testimony.

I was appointed by the board of supervisors of Mills County, to
29 aid in the adjustment and carrying out the contract of settlement of a suit between Mills County as plaintiff and the B. & M. Railroad Co. as defendant concerning the title to certain lands, which contract of compromise was made in November, 1868, by the parties, while said suit was pending in the Supreme Court of the United States. I examined the swamp land records and other records of Mills County, and prepared lists of lands which each was to convey to the other under and in pursuance of the terms of the agreement. In settling upon these lists we not only had recourse to the records of the county, but we called upon all parties in the county having pre-emption claims to any swamp lands to present the same to others and myself at a time appointed by public notice, previously given, when we would determine as to the bona fides of their claims. Wm. Hale and myself acted for the county, and D. M. Smith and H. A. Copeland acted for the B. & M. R. R. Co. Exhibit C attached to the petition in this action is a copy of the contract of settlement referred to. At the time appointed many citizens appeared and presented their claims, most of which were recognized by the parties as bona fide. A few were rejected.

Exhibit C, attached to the amended answer, I think, is a copy of the contract of settlement. From time to time I made reports of lists of lands to the board which the county was to convey under the contract, and I think our reports were satisfactory in each case, and conveyances made accordingly. The contract was treated as a settlement of pending litigation between the parties. Mills County had sold, or contracted to sell, most of the lands in controversy before the making of the contract. Many of the lands were occupied by actual settlers prior to making the contract. There was a good deal of feeling felt by the purchasers from the county as to the result of the suit. The law firm of which I am a member has been retained in a suit against one Jackson, in this county; the issue is which is substantially the same as those involved in this action. I was in favor of ratifying the contract when that question was submitted to a vote of the people. I think the securing of the building of the railroad through Mills County via Glenwood was in our minds, as citizens, when the contract was made. Fears were entertained by many that the road would not be built centrally through Mills County. I do not re-
30 member of hearing any officer or agent of the company say that as the people of the county had shown hostility to the company by sueing them the road might not be built through the county, or anything in regard to such a result. I cannot be certain as to dates, but my recol-

lection is that not long before the contract was finally settled upon in November, 1868, there were some surveying parties, who, I suppose, was seeking permanent location for the line of the road.

Testimony of W. H. Taft.

Is 46 years of age and at present I am the auditor of Mills County. I have in my possession two deeds of lands made by the B. & M. R. R. R. Co. to Mills County, in pursuance of the contract of settlement of a lawsuit between Mills County and the B. & M. R. R. Co., while the same was pending in the Supreme Court of the United States, and I have produced them and ask that they be attached to my deposition as Exhibits A and B.

(Below we give a copy of the deeds, both being alike, leaving out only the description of the lands and the concluding portion, which is in the usual form.)

Know all men by these presents that, for the consideration of the sum of one dollar and for the purpose of carrying out the terms and stipulations of a contract heretofore made with Mills County, in the State of Iowa, the Burlington & Missouri River Railroad Company does revise, release, and forever quitclaim to said Mills County, in the State of Iowa, the following-described land, situated in the county of Mills, and State of Iowa, to wit:

This deed is dated January 30th, 1871. The other one is dated October 15th, 1869.

Testimony of J. H. Wing.

I came to Mills County in 1858. I was a member of the board of supervisors of Mills County in 1868. I was a member of the board when a committee was appointed to submit a proposition to the railroad company for the purpose of settling a lawsuit about the title to a portion of the swamp lands in this county.

Ques. State what the object of the board was in appointing a
31 committee.

Ans. To settle this lawsuit.

Ques. You may state any causes that led to the submission of the proposition.

Ans. I thought it was for the best interest of the county.

Ques. What were the causes that led you to believe it was for the best interest of the county?

Ans. The suit was still pending, and there was a chance that the county might lose it. Considerable expense was attached and indirectly harassing the settlers. From the fact the county had sold to some of the settlers lands which they purchased, as they thought, in good faith, and paid for in full, and the title, so long as that suit was pending, was doubtful to their lands.

Cross-examined:

Is that the only inducement you can think of, Mr. Wing, or was the inducement about as it stood in the contract itself?

Ans. I have not seen the contract since that time.

Ques. Don't you know perfectly well that the only object was to secure this road to Glenwood?

Ans. We would not have made the settlement, or allowed that committee to have made it, without we had felt sure that we were settling the suit and leaving no loop-hole for future controversy.

Ques. In regard to getting the railroad to Glenwood, had that anything to do with it?

Ans. Well, I did not consider that.

Ques. Don't you know that that was one of the objects? Do you swear that it was not?

Ans. I would not swear that it was or was not, as far as I was concerned myself.

Ques. Don't you remember that there was some alarm here felt in reference to where that road would go?

Ans. I think there was, sir.

Ques. Don't you remember a survey that was made somewhere during that summer?

Ans. I do; from Red Oak to Council Bluffs.

32 Redirect examination:

Mr. Wing, was not that matter put in about the railroad being centrally built through the county just because we thought since we were making the proposition that we would get all we could?

(Counsel for plaintiff objects to that as incompetent, because it is an attempt to impeach the record. Objection sustained. Defendant excepts.)

Ques. Had the R. R. co., prior to the 20th of June, 1868, done anything, that you know of, or ever did know of, that influenced your action or the action of the board in submitting that proposition?

Ans. I recollect of none.

Recross-examination:

Ques. Don't you know that that Mud Creek survey was then in progress from Red Oak to Council Bluffs?

Ans. I did not; no, sir.

Ques. You swear it was not progressing along near your place as early as the first of June?

Ans. I do, sir.

Ques. Was not that survey in progress?

Ans. That I cannot say.

Ques. You do not know, then, whether it was before that time that that survey had been commenced?

Ans. No; I do not know; the first I knew of that survey was hearsay, and it was some time after that before I met Mr. Havens and became acquainted with him.

Question (by Mr. HALE). That was after the 20th of June, 1868, that you first heard of it, was it not?

Ans. I said I did not know when Havens commenced working on that survey. I am quite positive I never heard of it until after that proposition was submitted.

Question (by Mr. Ross). What do you mean by "submitted"?

Ans. The appointment of the committee.

I am positive that the Havens surveying party had not left that

33 line prior to the 3d of August, 1868, from the fact that I had thrashed grain on the 2d, and they came to my house to get grain for their teams. This is the first time I had met Mr. Havens. A flight of grasshoppers which we had at that time particularly fixes the date in my mind.

Testimony of S. M. Williams.

I have lived in Mills County nearly 10 years. I was a member of the board of supervisors in 1867 and 1868. I was a member of the board at the time a committee was appointed to confer with the R. R. Co. in regard to the settlement of the lawsuit. The object was to settle the lawsuit and secure to the actual settlers swamp lands in the county.

Ques. State whether or not the railroad company at that time had done anything that did have the effect of influencing your action in that matter.

Ans. I was not influenced in that matter by any particular thing, only what I thought was to the interest of the county at that time.

Ques. And it was for this purpose of securing the two objects that you have named?

Ans. Yes, sir.

Ques. Are you cognizant of anything that the railroad company had done at any time to influence the action of the board at the time the committee was appointed?

Ans. No, sir.

Ques. Mr. Williams, I will ask you this, in reference to this other matter that has been spoken of, whether the board did not just put in that as a condition, because they thought if they were going to make a proposition of settlement they would get the best terms they could get? Was not that the way it came in there?

Ans. We were working for the county, and wanted to make the best bargain for it we could, and if we could get the railroad through the county, and get the titles to swamp land settlers in the county, we thought we were doing a pretty good day's work.

Testimony of J. M. Powell.

Ques. State what these books are.

34 Ans. These are books belonging to the auditor's office. They are a record of the entries of pre-emption, and also of the sales of the swamp lands in the county.

Ques. Are there any other swamp land records in this county?

Ans. None that I know of.

Cross-examination:

Ques. I will ask you to state if these are not the only records of sales and pre-emptions of swamp lands in Mills County that were sold to individuals?

Ans. They are the only ones I have knowledge of. I am the auditor of this county.

Question (by Mr. Ross). You mean except record of deeds of sales?

Ans. Well, I took that as applying to the auditor's office, excepting the deeds of sale.

Question (by Mr. HALE). What deeds do you mean?

Ans. After the land is sold and paid for it is patented, deeded to the individual, a patent made under the order of the board of supervisors to the individual purchasing, and that deed is placed on record in the recorder's office.

Ques. Are there any records in the auditor's office showing what lands were patented? Do these show that?

Ans. No, sir; these do not show that.

Ques. What book have you there showing that?

Ans. There is no book down there that will show all of it.

Question (by the COURT). Do you offer the whole of the books, Mr. Hale?

Ans. I offer the whole of the books so far as they relate to the list of lands conveyed to Mills County or to individuals.

(Object overruled. Plaintiff excepts.)

To avoid expense and save time, counsel have agreed in writing that samples of the swamp land records of Mills County may be exemplified, and that such samples shall supply the absence of the whole record, which would show that prior to the institution of the first suit by Mills County against the B. & M. R. R. Co., about 9,000 acres of the lands in controversy in that suit had been disposed of by the county.

The agreement referred to is as follows, and the samples are attached as exhibits:

Stipulation.

MILLS COUNTY
vs.
THE B. & M. R. R. R. Co., THE C., B. & Q. R. R. Co., and others.

THE C., B. & Q. R. R. Co.
vs.
MILLS COUNTY.

It is hereby agreed and stipulated by the parties to each of the above-entitled causes that the swamp-land records of Mills County which were introduced in evidence on the trial of said causes by the defendants in the cause first above entitled, and by the plaintiff in the cause last above entitled, and which were identified as the original records by J. M. Powell, the county auditor, show entries similar to those shown and exemplified on Exhibit A, hereto attached, and that about 9,000 acres of the land that was in controversy in the former suit that was affected by the contract or proposition, the validity of which is involved in these actions, was disposed of by the county in the manner shown by said swamp-land records, an exemplification or sample of which records is shown on Exhibit A aforesaid. That in cases of what purports to be sales by the county a certificate of purchase was given to the purchaser, a correct form of which is hereto attached, and marked Exhibit D, and that in case of pre-emptions, a pre-emption certificate was issued, a correct form of which is hereto attached, and marked Exhibit E. This agreement and stipulation is made for the

sole purpose of avoiding the necessity of exemplifying the whole of said swamp land records in these cases, the exhibits hereto attached being samples of what they show. No other right is waived or in the least affected by this agreement, and this agreement is intended to supply samples of the testimony which might have been gleaned from the swamp-land records,

offered but not designated as stated on appellant' abstract, page 184
36 and 182; and it is further agreed that plaintiff, at the time of offering said book, objected to the same as irrelevant, immaterial, and incompetent; the court overruled the objections, and the plaintiff at the time excepted.

L. W. ROSS, *Att'y for Mills County.*
HALE, STONE & PROUDFIT,
Att'ys for C., B. & Q. R. R. Co.

EXHIBIT A.

November 26th, 1855, Harvey W. Summers purchased the E. ½ of the NE. ¼ of section 33, township 71, range 41.

(Signed) WM. SNUFFIN, *Clerk.*

November 28th, 1855, William McElroy entered the NW. ¼ of the NW. ¼ of section 3 in township 73, range 40, containing 35 $\frac{85}{100}$ acres. Received $44.80.

(Signed) WILLIAM SNUFFIN, *Clerk.*

December 5th, 1855, sold Eli Bates the NE. ¼ of section 25, and received two hundred and fifty dollars, and duplicate issued November 15th, and the west half NW. ¼ sec. No. 25 and the W. ½ NW. ¼ sec. 25, and the east ½ of the NW. ¼ of section No. 30, in township No. 72, range No. 41, on time.

(Signed) WILLIAM SNUFFIN, *Clerk.*

December 5th, 1855, sold Jas. J. Robbins the NW. ¼ of SE. ¼ of section No. 23, t'p 72, range No. 41. Received fifty dollars, and duplicate No. 17 issued for the same.

(Signed) WILLIAM SNUFFIN, *Clerk.*

37 EXHIBIT E.

Certificate of pre-emption.

STATE OF IOWA, *Mills County, ss:*

This is to certify that has this day proved before me, and to my satisfaction a good and sufficient pre-emption right to the following land, to wit, which is a part and parcel of the swamp and overflowed lands of said county and State.

Given under my hand with the seal of my office affixed this day of , 185 .

[SEAL OF COUNTY.]

, *County Judge of Mills County, Iowa.*

EXHIBIT D.

No. .] [8

STATE OF IOWA, *Mills County:*

CLERK'S OFFICE, GLENWOOD, *day of* 185 .

Received of the sum of dollars and cents in full for the quarter section of township , range number , being a part and parcel of the swamp and overflowed lands of Mills County, Iowa.

[SEAL.] , *Clerk.*

38 *Testimony of Wm. Hale.*

I reside in Glenwood, Mills County, Iowa; am a lawyer by profession; have lived in the country 17 years; I represented Mills County in a lawsuit pending between the county and the B. & M. R. R. Co. The suit was brought in 1862 or 1863 by Mills County against the B. & M. R. R. Co. The record of the suit to which I refer has already been introduced in evidence.

The suit was begun in the district court of Mills County. It was carried to the supreme court of *of* the State, and from there to the Supreme Court of the United States. There was a proposition made for a settlement of that lawsuit while it was pending in some of these courts in 1866. I was authorized by the board of supervisors to submit a proposition to the R. R. Co. for a compromise of the suit, which I did in June, 1866. The contract that I then submitted is similar in terms to the one in controversy. It was not accepted. On the 20th day of June, 1868, Mr. D. H. Solomon, E. C. Bosbyshell, L. W. Tubbs, and myself were appointed a committee by the board of supervisors of Mills County to submit a proposition for a settlement of the suit that was then pending in the Supreme Court of the United States.

In the forepart of the month of July, 1868, Mr. Bosbyshell, Mr. Solomon, and myself went to Burlington, and there submitted the proposition to Mr. C. E. Perkins, the general sup't of the B. & M. R. R. Co. at that time. We returned, and on the 31st of Oct., 1868, we were notified in writing of the acceptance of the proposition, and in a day or two we reported our action to the board of supervisors with the acceptance of the R. R. Co., and our action in the matter was ratified by the board.

Soon after the ratification of this contract I told M. Harvey, or wrote him a letter, as he was going to Washington, D. C., to inform Mr. Thomas Ewing, of Ohio, who was associated with me in the case of Mills County, of the fact that this proposition had been accepted; and I also wrote to Mr. Ewing about that time.

Wm. Hale recalled.

Ques. I will ask you to state, if you have any knowledge of the
39 whereabouts of these letters, in your correspondence with Thomas Ewing.

Ans. I do not. I supposed they were in the office, where I

could lay my hand upon them, until last night and this morning. They were taken from the file for the purpose of looking up a matter of fees in that case, for Mr. Williams, in representing the estate of Mr. Ewing, but I have not seen them since. I will say this, that I had a correspondence with Mr. Ewing in regard to the case after the settlement. I know that he knew of it, but whether it was a distinct reply to that I cannot now swear. I know that he knew of it by correspondence, I think before the 12th of April, 1869 (I am confident he did afterwards), and I know the matter was referred to in his correspondence, that nothing more was to be done with the case; that it was settled. I remember that fact distinctly.

Cross-examined:

Ques. Have you made search yourself personally?

Ans. I have not; I can do that yet. Mr. Proudfit, my partner, looked for them last night and this morning, I have not made search myself.

(Counsel for defendants offers in evidence the letters to Thomas Ewing from Mr. Hale, dated April 12th, 1869, of which a copy of the press copy is hereto attached marked Exhibit C. Objected to as immaterial, irrelevant, and incompetent. Objection overruled. Plaintiff excepts.)

(Copy.)

GLENWOOD, IOWA, *April 12th*, 1869.

Hon. THOMAS EWING,
Washington, D. C.:

MY DEAR SIR: I am in receipt of yours of the 8th inst. I requested Hon. J. A. Harvey, now in Washington, and who is att'y for Fremont County vs. B. & M. R. R. Co., to inform you that the case of Mills Co. vs. B. & M. R. R. Co., to which you refer, was, in July last, settled by the county and R. R. authorities. It was agreed that the case should be continued from term to term until it should be ascertained that the B. & M. R. R. Co. would comply with the conditions of the settlement.

Respectfully,

WM. HALE.

40 *Testimony of D. C. Briggs.*

I am a resident of Silver Creek T'p, Mills County, Iowa; have been a resident of Mills County 21 years. I was a member of the board of supervisors from Silver Creek T'p one term (two years). I do not recollect exactly, but think it was the years '67 and '68, or '68 and '69.

I think I was a member of the board of supervisors in June, 1868. If there was a committee appointed to submit a proposition of a compromise of a lawsuit concerning swamp lands, then pending in the Supreme Court of U. S. between Mills County and the B. & M. R. R. Co., I was absent on that occasion. I was a member of the board of supervisors during the adjustment of a contract of settlement of the lawsuit. The question of compromise was before the board, and they ratified it and agreed to the compromise. If I recollect right, they quitclaimed to the railroad a portion of the lands, and received from the railroad a quitclaim to other lands in

exchange, and I also recollect they were to pay the railroad company a stated sum of money; I think $10,000.

Ques. Were you a member of the board at the time some of these deeds were made?

Ans. Yes, sir.

The compromise was to settle a lawsuit which was pending between Mills County and the railroad company, and thereby settle the titles of the settlers on swamp lands purchased from the county.

Ques. Was there any doubts existing in the minds of the people and of the board as to the result of that lawsuit?

Ans. There was.

Cross-examination:

Ques. Did you understand that that was the only object?

Ans. Those two are the only motives influencing me in my action as to it.

Ques. Do you not know that there was considerable anxiety felt in regard to the location of road?

Ques. I was aware some of the people did feel anxious, but I did not myself.

41 Ques. Do you not know that other members of the board did?

Ans. No, sir; I do not.

Ques. Was you present at the time of the ratification of the contract?

Ans. It is possible; I was not present at the time the vote was ratified but I was present at the time the deeds were signed.

Ques. You knew the contents of the proposition, did you not?

Ans. I did.

Ques. You were aware that a part of that was to secure the road through Glenwood, and if it was not built it was to fall to the ground and not be of any effect, were you not?

Ans. The only two points of any importance are those I named, to stop the suit and secure the title to the lands of the old settlers. I did not consider the location of the road a question. I felt sure they would go where they pleased, regardless of what we did. I heard of a railroad line being run from Red Oak to Council Bluffs, but whether it was before or after the appointment of the committee, I cannot remember.

Redirect examination:

If a railroad line was run from Red Oak to Council Bluffs before the compromise was affected, state whether or not it had any influence upon your mind and your vote?

Ans. Not at all. This matter of compromise had been discussed in meetings of the board previous to this suit, when I was present. I know what the sentiment of the board was upon the subject. It was as I have previously stated.

Recross examination:

Ques. Mr. Briggs, you have some interest in the swamp land yourself, have yot not?

Ans. I had a pre-emption claim on a quarter section.

Ques. You got it, did you not?

Ans. No, sir.

Ques. Didn't you get any?

42 Ans. I had a contract for another forty acres, which I got.

Redirect examination:

I had a contract of purchase of the county to a forty-acre tract of land, which came to me in pursuance of this contract.

Testimony of E. A. Touzalin.

I am a resident of Burlington, and land commissioner of the C., B. & Q. R. R. Co. I have held that position for about a year and a half.

Ques. State in whose name the transactions in the disposition of the lands belonging to said company, have been carried on since Dec. 31st, 1872, up to July 31st, 1875.

(Objected to by plaintiff as incompetent, irrelevant, inadmissible, not being the best evidence.)

In the name of the B. & M. R. R. Co.

Ques. State for whose benefit, and at whose direction the business transactions of which you are the head, have been carried on since the 31st day of Dec., 1872.

(Objected to for same reason as above.)

Ans. For the benefit of and under the direction of the C., B. & Q. R. R. Co.

Ques. State the reasons for the business transactions referred to, if any, being carried on in the name of the B. & M. R. R.

(Same objection, and does not disclose whose reasons are called for.)

Ans. The reasons were briefly, that on the 31st of December, 1872, a perpetual lease of the B. & M. R. R. was made to the C., B. & Q. R. R., and a transfer of all its assets, including lands, contracts, bills receivable, &c., but the said lease looked forward to an absolute transfer and deed to be made at a subsequent day, which was consum'ated July 31st, 1875. The business, therefore, was done in the name of the B. & M. R. R. until the last date. Since that time all business has been done in the name of the C., B. & Q. R. R.. (Answer objected to because it purports to give contents of a written instrument and is therefore inadmissable.) This document (witness here produced a paper) is the original lease and agreement

43 between the B. & M. R. R. and the C., B. & Q. R. R., dated Dec. 31st, 1872, a copy of which I furnish to be attached to my deposition and marked "Exhibit A."

Take this document (here the witness was handed a paper) and state what it is and whether you are familiar with it, and whether it has come under your notice and attention since you occupied the position you now hold of land commissioner to the C., B. & Q. R. R.; and if you are familiar with it, and it has come under your notice, state what has been done by the B. & M. R. R. in complying on its part with the terms and conditions therein agreed to.

(Objected to for reason as above, and that it does not call for simple facts, but influences and opinions.)

Ans. This document is the original compromise of the suit between Mills County and the B. & M. R. R. and in one of the records of this department. The compromise has come under my attention, as it has been my business to look after the new suit brought by Mills County against

the railroad. The railroad has complied with all the conditions of the agreement, and has made various deeds to Mills County and to parties claiming under Mills County of dates as follows: Oct. 31st, 1868; Jan. 18th, 1870; Jan. 30th, 1871, and as attached to the answer of the C., B. & Q. R. R., there marked "Exhibit C."

(Objected to the answer as being inadmissible and not best evidence, and a portion of it as being merely the opin' 'nd inference of witness.)

Ques. These deeds were made in pursuance of the compromise, and the company received no other consideration save lands transferred to the company by the county, as in pursuance of the compromise.

(Objection as above.)

Ques. State what was done immediately after the execution of the lease of Dec. 31st, 1872, with the property therein described, that had prior to that time been controlled by the B. & M. R. R.

(Same objection.)

Ans. The C., B. & Q. R. R. Co. took possession of the property,
44 both land, assets, and moneys.

Cross-examined:

Ques. Please describe the property that was turned over by the B. & M. R. R. Co. to the C., B. & Q. R. R. Co., and, if any money was turned over, state the amount.

(Objected to as immaterial, irrelevant, and not proper cross-examination.)

Ans. I believe that the whole property of the company as specified in the case was transferred, and as far as this department is concerned there was turned over to the C., B. & Q. R. R. Co. about 181,000 acres of land, about 2,000,000 bills receivable; in cash exactly $102,987.88 was paid to the treasurer of the C., B. & Q. R. R., being the surplus on hand at that date.

(Objected to because irrelevant and immaterial.)

Testimony of L. W. Tubbs.

I have lived in Mills County over 20 years; have held the office of probate judge. I was in Mills County at the time the committee was appointed to confer with the railroad company concerning the compromise of a lawsuit that was pending between the county and the company. I was a member of that committee; I think it consisted of four or five or six members.

Ques. State what had been done by the railroad co. prior to June 20th, 1868, the date of the appointment of the committee for the purpose of inducing the county to make this proposition.

Ans. The county had sued the company to recover certain lands; there was a suit pending between the r. r. co. and Mills County at that time. I don't know that there had been anything done by the r. r. co. to induce the appointment of that committee.

Ques. What was the cause that induced the supervisors of the county to submit that proposition, so far as you know?

Ans. The cause was this: quite an uneasiness was felt by the citizens of the county at that time. The county had sold a large portion
45 of these lands to individuals, and there was a suit pending to quiet

the title, and these individuals were anxious to have this matter settled so they might get a title from somebody to their homes.

Ques. Had the railroad company prior to that time surveyed any lines in or near or through Mills County, except the original line?

Ans. None except the original first survey about 1856.

Ques. You were a citizen of the county at the time this committee was appointed. Were you familiar with the sentiment of the county and the wishes of the board at that time?

Ans. I was; dealing in stock at that time had a great deal to do with the people of the county.

Cross-examined:

State what you know concerning a doubt as to the result of that suit that was pending, when it was compromised by the parties.

Ans. There was a doubt as to the result among the people at the time. Those that were particularly interested and those that had bought lands were anxious to have the matter settled.

Testimony of D. N. Smith.

I am 63 years of age, and reside in Burlington, Iowa; I was employed to represent the B. & M. R. R. Co., in the adjustment of the contract of settlement of a lawsuit between Mills County, as plaintiff, and the said Railroad Company as defendant. Exhibit C, attached to the petition of the C., B. & Q., in this case, is a copy of the contract referred to, and which I attach to my deposition as Exhibit A. I employed H. A. Copeland to aid me to work in connection with H. C. Watkins, and Wm. Hale, on behalf of the county, in making the adjustment. The terms of the contract by the parties thereto were fully carried out on both sides, except the payment of the $10,000. The board made deeds to the company, and the company made deeds to the county in exchange, and also to individuals, who had some claim from the county, before the settlement.

46 Both the county and the company treated the contract as a final settlement of the suit, and both were well satisfied when the same was finally carried out in all respect, except the payment of the $10,000, by the county. The railroad company performed all the conditions of the contract on its part, and so also did the county, except as to the payment of the $10,000. My statements are all made from personal knowledge.

Testimony of D. M. Whitfield.

I was a member of the board of supervisors of Mills County in 1871. There was presented to the board while I was a member a claim on the part of the railroad for the $10,000 provided to be paid in this settlement. I think it was presented by Mr. Watkins, then attorney, in behalf of the railroad. The board did not settle it. Mr. Buffington and Mr. Creech concluded they would sign the deeds presented by Mr. Watkins. But the board was unanimous in refusing to pay the $10,000.

Cross-examination:

Mr. Whitfield, what time was that? In 1871; that was the cause of the submission. Mr. Watkins was chosen to make a statement of this matter and have it published after its approval by the board. Mr. Wat-

kins, their attorney, and Mr. Creech, and Mr. Buffington thought it was the best they could do; they felt that it should be submitted to the people. I did not sign the deed when presented at that time. Mr. Buffington and Mr. Creech signed it. I think it was less than 300 acres they deeded at that time. The order of submission was not made at this meeting; it was talked over, and was to be arranged at the next meeting; we did not call a special meeting of the board.

Testimony of John M. Forbes.

I have been a director of B. & M. R. R. R. Co. since 1859, and am now. I know that in the eastern and central portion of Iowa, the B. & M. R. R. R. Co. made some very expensive mistakes by not taking more time, and spending more money to ascertain the most advantageous and ex-
47 peditious route. No "scare lines" were ever run by order of the directory, and none at all so for as I ever knew or heard. Mr. Joy, who was a very influential member of our board, had a large interest in the Council & St. Joe R. R., and he was anxious that the B. & M. should build from Red Oak to Council Bluffs, and thus leave a large territory tributary to his road. The survey from Red Oak to Council Bluffs was made for the purpose of finding out the most feasible line. It was entered by the urgent request of Mr. Joy.

Testimony of C. E. Perkins.

I reside in Burlington, Iowa. I was superintendent of B. & M. R. R. Co. in 1868. I ceased to act in that capacity the 31st day o' Dec., 1872.

(Here the witness was handed the original contract of compromise.)

Ques. Did you sign that contract on the part of the B. & M. R. R. Co.?

Ans. I did. This proposition was made to me as the resident agent of the B. & M. R. R. Co. There had been nothing done by the R. R. co. prior to this time to induce the submission of this proposition by Mills County. Surveys were made west of the point where the road was then operated for the purpose of determining the best location for the road, and it was for that purpose the survey was made from Red Oak to Council Bluffs. There was no lines surveyed west of Red Oak for the purpose of exciting the fears of the people of Mills County, and thereby inducing them to submit a proposition of compromise of the suit then pending in the Supreme Court of the U. S. between Mills Co. and the B. & M. R. R. Co.

My understanding was that this compromise ended the litigation. It was treated as a final settlement of the case, provided the company complied with its part of the contract, which it did. The receipt of this proposition would have been very slight, as compared with the importance of building the line so as to connect with the Nebraska extention, and of draining the widest country possible. In other words, this propo-
48 sition of Mills County would not have determined the company in building to Plattsmouth, if there had been no other inducements. The principal inducement which led the company to accept this proposition of the county was to compromise the lawsuit.

Cross-examination:

The compromise was to be a final settlement, provided both parties went on and complied with the contract.

It is agreed between counsel on both sides that another question-in-chief may be asked.

Ques. Can you state why the business of disposing of the lands in controversy has been carried on in the name of the C., B. & Q. R. R. Co.?

Redirect examination:

Ans. It is because no formal transfer was at first made by the B. & M. R. R. Co. to the C., B. & Q. R. R. Co.

There was a strong effort made to induce the building of the road on the line from Red Oak to Council Bluffs.

Recross-examination:

I think this proposition had very slight inducements upon the company to build the road through Mills County, so slight that it would have been built there any way, on other considerations. The settlement of the lawsuit was the only inducement that led the company to accept.

49 *Testimony of E. C. Bosbyshell.*

I have lived in Glenwood twenty years. I was county judge from 1857 to 1859. I met Mr. J. F. Joy on a steamboat in 1866, going down the Missouri River. He was at that time president of the Burlington & Missouri River Railroad Company. I had no conversation with him as to any particular place the road would be built in Mills County. He said he did not know then where the road would be built. He said nothing about a double terminus. He said nothing about whether it would run through Mills County. He said they did not like to build a road where the people were fighting them. I said I did not know that we were. He then referred to the suit about lands. I said why not fix up that suit. He said they were willing to settle the suit and wanted to know why the county authorities were not willing to settle. He said both the Mills and Fremont County cases ought to be settled. I told him that the two counties could not move together in a settlement, as Fremont wanted the road as bad as we did, and would be independent of us. He said nobody was independent of a railroad company. That was just the whole sum and substance of our talk. I was on the committee that made the proposition for a compromise in 1868. I could not tell what the condition of the public mind was as to where the road would go or where it would be built at the time we went to Burlington.

(Counsel for Chicago, Burlington & Quincy Railroad Company objected to the foregoing testimony because hearsay, irrelevant, and incompetent. Objection overruled, and company excepts.)

The object, as I understood it, in making the proposition, was to quiet titles to the homes of the purchasers from the county and settle the lawsuit.

50, 51, 52

53 *Testimony of J. M. Walker.*

I am fifty years of age, and at present am managing the affairs of the

C., B. & Q. R. R. Co., as its president. On the 31st day of December, 1872, I was president of the said railroad company, and had much to do with the making of the contract of lease and transfer of the B. & M. R. R. Co. and its property to the C., B. & Q. R. R. Co., dated December 31, 1872. I was one of the board of directors of said C., B. & Q. R. R. Co., and was present at the meetings of the board when the questions relating to the transfer were discussed. I prepared the contract of lease myself, and executed it on behalf of the Chicago, Burlington & Quincy Railroad Company. At the time of said lease, and previously thereto, and during all the time of the negotiations for said lease and transfer, I knew that the Government of the United States had made to the State of Iowa, and that the State of Iowa had made to the Burlington & Missouri River Railroad Company, a grant of lands to aid in the construction of that road, and those lands were included and were intended to be included in the transfer and lease by the Burlington & Missouri River Railroad Company to the Chicago, Burlington & Quincy Railroad Company of December 31, 1872; and I supposed and believed at that time that the lands in controversy were transferred by that lease and the title thereto became fully vested in the Chicago, Burlington & Quincy Railroad Company. I did not at that time know that there were any outstanding claims of any kind whatsoever on the part of Mills County for the lands in dispute, nor was there any information given to the board of directors of any outstanding claims by any party or parties to the lands in controversy.

Testimony of Henry Strong.

I was engaged as counsel for the defendant in a case instituted in the district court of Mills County, Iowa, wherein Mills County was plaintiff and the Burlington & Missouri River Railroad Company was defendant.

54 The litigation involved in said case was about certain lands claimed by the Burlington & Missouri River Railroad Company, under a grant from the State, being a part of the grant by the general government to the State to aid in the construction of railroads, and the county claimed the lands under the swamp-land grant. Said cause was tried in the district court of Mills County, and an appeal was taken from there to the supreme court of the State of Iowa, and the judgment below was affirmed. An appeal was then taken to the Supreme Court of the United States. Both the Fremont and Mills County cases against the Burlington & Missouri River Railroad Company were pending in the Supreme Court of the United States at the time the Mills County case was compromised. Those two cases involved substantially the same litigation. The Mills County case was compromised by the parties thereto by a proposition made by the board of supervisors on July 13, 1868. After the agreement of compromise was made and accepted nothing was done in the case except to carry it out, which was done by the parties making conveyances to lands, as provided in the contract. No attention was given to the case after July 13, 1868, by counsel for the defendant, as the matter was supposed to be compromised and settled. Said cause, after July 13, 1868, was treated as settled and disposed of by said compromise. Said compromise was treated as a final and complete adjustment of all questions arising under that suit, and was so treated by counsel for defendant, and by the defendant itself.

Testimony of H. A. Copeland.

I am forty-eight years of age, and reside in Vermillion, Clay County, Dakota Territory. A copy of the contract of settlement was handed to Mr. Copeland and he then stated that it was a copy of a proposition of compromise of a lawsuit then pending in the Supreme Court of the United States, in which Mills County was plaintiff and the Burlington & Missouri River Railroad Company was defendant.

Ques. State whether or not you had anything to do with the adjustment of said contract; and, if so, state for whom you acted, when and during what period of time you so acted, and in conjunction with whom you so acted, and state fully what was done.

55 A. I had nothing to do with submitting the proposition or its acceptance, unless it was to file, sign, or certify to papers officially as clerk of the board of supervisors; but I was afterwards engaged in arranging the preliminaries and in carrying out the provisions of the contract of compromise. I was employed and acted for the railroad company. The first work I did in this matter was to make an abstract of the swamp-land records of Mills County, showing what action the county had taken as to each tract. I think I made this abstract while I was clerk. My term of office as clerk of the district court expired the first Monday in January, 1869, and a few days later D. N. Smith, an agent of the railroad company, employed me generally to look after the interests of the railroad company during the adjustment. I was connected with the adjustment of the matters referred to in the contract for compromise from the first step, which was in the spring of 1868, until the matter was finally settled by signing and exchanging deeds. In the settlement of this matter D. N. Smith and myself acted for the railroad company and H. C. Watkins and Wm. Hale acted for the county. We went over the whole record to determine such pre-emptions as were fraudulent and such as were valid. We agreed to the validity of all the pre-emptions except a few tracts. We arranged the land in separate lists, and all the even-numbered sections not sold by the county and all the odd-numbered sections not sold by the county, and on which there were no valid pre-emptions, were conveyed by the county to the railroad company, and all the odd-numbered sections which had been sold by the county were conveyed by the railroad company to the county. The odd-numbered sections on which there were valid pre-emptions were conveyed by the railroad company to the holder of such pre-emption, on payment of $1.25 per acre. This was regarded by all parties as a final adjustment of the whole matter. It was inaugurated by the county supervisors for the purpose of settling the lawsuit, quieting the titles to citizens' farms, and securing the construction of the railroad through the county.

The county and the company treated the contract as a compro-

56 mise for the settlement of the lawsuit before referred to. I was clerk of the board of supervisors when the matter was first suggested. Many prominent citizens of the county had become quite impatient about their homes, the title to which was involved in this suit, and a heavy pressure was brought to bear on the board by parties, especially who lived on the bottom lands, demanding a settlement of the suit, and the

committee which was sent to Burlington was instructed by the board of supervisors to settle the suit if possible. I held no official position in Mills County during the time of the adjustment of this contract. My statements are all from personal knowledge.

Testimony of Chas. W. Spalding.

I reside in Burlington, Iowa. I am thirty-two years of age. I am secretary of the Chicago, Burlington & Quincy (formerly Burlington & Missouri River) Railroad land department. I was local agent in Glenwood, Iowa, in 1870. I prepared the list of lands in controversy on which taxes were paid for each of the years 1870 and 1871. J. M. King superintended the payment of taxes for the Burlington & Missouri River Railroad Company, in Mills County, for 1870, on the lands in controversy. I superintended the payment of the taxes on the lands in controversy for the years 1871, 1872, and 1873. I have a list of the lands in controversy on which the taxes were paid by the railroad company for the years 1870, 1871, 1872, and 1873. I here produce the same, and hand it to the notary to be attached to my deposition as Exhibit A. Myself, J. M. King, C. B Atkins (treasurer), and W. D. Davies were present at the time the taxes described in this list were paid.

The money was paid to C. B. Atkins, treasurer of Mills County. This list of lands, described in Exhibit A, was compared with the tax record by myself and W. W. Peet. The tax record was made from the original tax receipts. I have compared them myself to see that the entries were correct. The original tax receipts were issued by the treasurer of
57 Mills County. Exhibit A is a list of the lands in controversy, showing the section, township, range, acres, and taxes paid by the Burlington & Missouri River Railroad Co. for the years 1870, 1871, 1872, and 1873. It shows the amount for each of those years, 1870, 1871, 1872, and 1873. The grand total of taxes paid for those years amounts to $4,125.36; for 1870, $912.04; for 1871, $1,230.65; for 1872, $1,063.20; for 1873, $919.47. It describes also 160 acres of land, which was included in the deed made by Mills County to the Burlington & Missouri River Railroad Company, as to which there never was any controversy. This 160 acres was not a part of the swamp land selections; never entered into the controversy; belonged to the clear list; was certified to the Burlington & Missouri River Railroad Company as belonging to the clear list of land. It is described as follows: West ½, southeast ¼, section 1, township 72, range 40 W., 80 acres, and W. ½, southwest ¼, section 1, township 71, range 43 W., 80 acres. We paid the taxes for 1870, 1871, 1872, and 1873 on that land also. The amount of tax on this land for 1870 is $9.76; for 1871, $14.60; for 1872, $14.00; for 1873, $10.62. Exhibit A was carefully compared with the records of this office, which records were compared with the tax receipts by myself, and the same were found to be strictly correct. The 160 acres of land mentioned has never been in controversy with any one to my knowledge.

(The witness was here handed Exhibit A, attached to the answer of the Chicago, Burlington & Quincy Railroad Company in the suit with which this was consolidated.)

It is a correct list of the lands in controversy that had been sold by the

Burlington & Missouri River Railroad Company prior to December 31, 1872.

(Witness was here handed Exhibit B to the answer of the Chicago, Burlington & Quincy Railroad Company, the case with which this was consolidated.)

It is a correct list of the lands in controversy which have been sold by the Burlington & Missouri River Railroad Company subsequent to December 31, 1872, and warranted.

The Burlington & Missouri River Railroad Company did con-
58 vey a certain list of lands to Mills County. I have a list of the same, showing the date of the deed, our office number, and the acres, which I hand to the notary to be attached to my deposition and marked Exhibit B. These lands were deeded by the Burlington & Missouri River Railroad Company to Mills County in pursuance of the compromise of 1868, and in consideration of other deeds made by Mills County to the Burlington & Missouri River Railroad Company.

Ques. You say in consideration of other deeds by Mills County to the Burlington & Missouri River Railroad Company. State what lands these deeds described.

Ans. These lands in controversy.

Q. You spoke of the compromise of 1868. What compromise was that?

A. It was the compromise of a lawsuit instituted by Mills County against the Burlington & Missouri River Railroad Company to recover the railroad lands in Mills County.

Q. Have you ever seen the contract by which that suit was compromised?

A. I have.

Q. State whether this is a copy of it (showing witness Exhibit C to the answer of the Chicago, Burlington & Quincy Railroad Company in the case with which this was consolidated).

A. It is a correct copy as the pencil erasures now stands.

Where blanks occur in this list, Exhibit A in my deposition, the taxes were paid by the parties to whom the railroad company sold.

Q. Take this paper (here the witness was handed Exhibit C attached to this deposition) and state what it is.

A. It is a list of the lands which were deeded by the Burlington & Missouri River Railroad Company to individuals holding some claim on them from Mills County in pursuance of the compromise of 1868 and deeded by the Burlington & Missouri River Railroad Company, J. N. Denison, or H. S. Russell, to parties holding some title or claim from Mills
59 County. I hand the paper to the notary to be attached to my deposition as Exhibit C. These conveyances from J. N. Denison and H. S. Russell were made in pursuance of an agreement between the county and the Burlington & Missouri River Railroad Company, in pursuance of the compromise.

Q. Explain how conveyances came to be made by them.

A. In the case of J. N. Denison tax deeds had been issued, which were controlled by the Burlington & Missouri River Railroad Company. In the case of H. S. Russell certificate of tax sale had been issued. They held the tax deeds and tax certificates for the Burlington & Missouri River

Railroad Company. The Burlington & Missouri River Railroad Company received in consideration for the conveyances of the lands in Exhibit C the amount of taxes originally paid, with ten per cent. interest and five per cent. penalty, under and in pursuance of the compromise whereby the railroad company were to release any claims they might have to bona fide purchasers from the county.

Q. Examine that list (here the witness was handed a list that is hereto attached marked Exhibit "D").

A. It is a list of lands in controversy which had been sold by Mills County previous to the compromise, and upon which the purchasers paid the balance of the purchase money to the Burlington & Missouri River Railroad Company in compliance with the terms of the contract. These lands were all conveyed by the Burlington & Missouri River Railroad Company to Mills County in pursuance of the stipulations of the contract.

These lands on this list are included in lands described in Exhibit B to my deposition.

After the compromise was adopted by the board they appointed a committee to confer with the agents of the railroad company for the purpose of ascertaining such claims as were bona fide and such as were fraudulent, and as a result of this investigation by that committee these lands described in Exhibit D were conveyed to Mills County for the benefit of those bona fide pre-emptors.

On the part of the railroad the committee consisted of D. N.
60 Smith and H. A. Copeland. On the part of the county, H. C. Watkins, and Wm. Hale.

Q. Examine this list (here the witness is handed a list which is attached to his deposition Exhibit "E") and state what it contains.

A. It contains a list of lands in controversy upon which tax deeds were held by J. N. Denison, or tax certificates by H. S. Russell for the railroad company, which have been quit claimed to the parties claiming them under Mills County in pursuance of the compromise.

Q. Explain how that was brought about, and the consideration, if any, that was paid them for their tax deeds or tax certificates.

A. It was brought about by the agreement between the county and the railroad company, under which agreement the railroad company, released to purchasers or pre-emptors these tax titles or tax certificates, for the original amount of taxes paid, with ten per cent. interest and five per cent. for cost of conveyances, agents' fees, etc., thereby foregoing the penalty of thirty per cent., to which they would have been entitled at that time. Thirty per cent. was the penalty added to taxes immediately upon tax sales at that time. From this general adjustment or compromise the company lost a sum of money which they would otherwise have been entitled to in case redemption had been effected at the auditor's office, equal to twenty-five per cent. of the taxes paid, and of the subsequent taxes.

These tax deeds and certificates were held by Denison and Russell for he Burlington & Missouri River Railroad Company.

Cross-examination:

I know that Exhibit B attached to my deposition is correct, from the fact that the duplicate contracts are on file in each case.

I know that Exhibit A attached to the answer of the Chicago, Burlington & Quincy Railroad Company in the main case is correct, from

the fact that the duplicate contracts in each case are on file in this office. These contracts are of the same general nature, differing only in the time.

61 Re-examination:

(The witness was handed a paper marked Exhibit M.) State what it is, and whether it is correct. This shows a list of lands in controversy upon which the Chicago, Burlington & Quincy Railroad Company holds tax titles or certificates of tax sale or both, showing to whom sold by the railroad company, date of sale, No. of contract, date of the sale for taxes, amount tax paid at the sale and subsequent taxes.

(Counsel for Chicago, Burlington & Quincy Railroad Company have omitted printing the exhibits showing the list of lands, as we presume they will be correctly described in the abstract made by Mills County in the case with which this action was consolidated, and to print them here would unnecessarily enlarge the abstract.)

To avoid expense of copying receipts and for convenience the parties agreed in writing to the following at the close of Mr. Spalding's evidence:

MILLS COUNTY
vs.
THE B. & M. R. R. R. Co., C., B. & Q. R. R. Co., et al.

District court of Mills County, Iowa.

It is hereby agreed and stipulated by the parties to the above-entitled cause that Exhibit A to the deposition of C. W. Spalding, signed on the 16th day of December, 1875, shall be received, though it be secondary and inferior evidence, and that the tax receipts thereof need not be produced and the production will not be required by plaintiffs, but plaintiffs reserve the right to correct any errors that the records in the treasurer's office may show to exist. This may be attached to said Exhibit A. This 17th day of December, 1875.

ROSS, SOLOMON & LAWRENCE,
Attorneys for Plaintiff.
O. H. BROWNING,
HAGE, STONE & PROUDFIT,
Attorneys for Defendants.

62 MILLS COUNTY'S EVIDENCE.

Testimony of Wooster Fay.

I reside in Keg Creek Township, Pottawattamie County. In the spring of 1868, I think, a survey was made through the neighborhood where I live. They stopped four or five weeks in my door yard. The party was in charge of Engineer Haven. So far as I know, the survey was made under the direction of the Burlington & Missouri River Railroad Company. I think there were four parties in all, and the one under Haven was No. 4. The survey was being made from Red Oak to Council Bluffs. I think they quit in July.

Ques. State what conversation you had with the engineer in charge at the time of his leaving.

(Objected to by defendant's counsel as being hearsay. Objection overruled and defendant excepts.)

Ans. About the time Havens was leaving he says to me: "Mr. Fay, you will get no railroad here. The road will be built through Mills County via Glenwood. The county has withdrawn the swamp land suit and given us a free way through the county and depot grounds at Glenwood. Although this survey has cost about $6,000, yet we will make $100,000 out of Mills County." He was not disposed to talk much. He told me once of having met a Glenwood man, and that he told the Glenwood man that a road could be built one-quarter of a million dollars cheaper on the route from Red Oak to Council Bluffs, and he carried the idea that he had "stuffed" the Glenwood man.

(Objected to as hearsay, which was overruled, and defendant excepts.)

There were six or eight men in the party. Mr. Noah Hanks was a member of Haven's party.

At the time of making this survey I do not think the Burlington & Missouri River Railroad was built west of Red Oak, but I am not certain.

63 *Testimony of Noah Hanks.*

I belonged to surveying party No. 2, under Theilsen. It came to Glenwood from Red Oak early in the season. Theilsen came along in a wagon. He was the chief engineer of the Burlington & Missouri River Railroad Company. I had been with the party about a month.

Q. State anything you heard Theilsen say as to the line through Mills County.

(Objected to as hearsay and incompetent. Overruled, and defendant excepts.)

A. He said there was a certain point about Glenwood that he had to establish; that this would be the permanent line through Glenwood, and make an intersection here with the other road. The boys were cautioned to say nothing about it.

(Objected to as hearsay, incompetent, and irrelevant. Objection overruled, and defendant excepts.)

We left Burlington in April, I think. We got to Red Oak about a month after we left Burlington. When we came to Glenwood we went to work. We ran several trial lines. After we got through with these lines I went to Red Oak to join No. 4, under Haven. I worked on that survey from Red Oak to Council Bluffs. We left that line in August, 1868. The line we run was a trial line. Theilsen was in our party every once in a while, and when he was there I observed conferences between him and Haven.

Cross-examination:

The surveys we made about Glenwood were made in June, 1868. I had no understanding that any of these lines were run to influence the people or to scare them. I have had considerable experience running lines, and trial lines are always run before the road is located. They are often run for purposes of location and sometimes for excavations. My experience is when the chief engineer and surveyors come together they always confer privately and keep things hid from the boys.

64 Redirect:

This line from Red Oak was a trial line, though we located some on that route. I think we located half or more of this line. The location was done with great care and precision until toward the last. The transit man said once that we need not be so very particular, as the road would probably be built here. This was when they were fixing to work on this road here. This was toward the last of the survey from Red Oak.

Testimony of J. M. Powell.

I am county auditor. This book is the election record of Mills County, and these pages show the result of the vote on the ratification of the contract of compromise in 1871. Mills County then introduced the book, to which the Chicago, Burlington & Quincy Railroad Company objected on the ground:

1. That if there is a mistake in the canvass of the vote this court cannot correct it, and cannot hear testimony concerning whether or not there is a mistake. It can only be done by canvassing the votes, and there is no law authorizing this court to canvass the votes. There is no law authorizing the canvass, except by pursuing the course pointed out for testing the result of an election.

2. That the making of deeds by the county under the contract was not a devotion of lands for the making of railroads, and hence it was not necessary to submit it to a vote of the people.

3. There is no law providing for the submission of the question to ratify a contract already executed in good faith to the people.

(Objection overruled, and the Chicago, Burlington & Quincy Railroad Company excepts.)

Mills County then proceeded to prove by oral testimony that there was a mistake in the record, and that a majority of the votes cast were opposed to ratifying the contract. To all of which the Chicago, Burlington & Quincy Railroad Company objected and excepted to the ruling of the court.

65 In supreme court of Iowa, March term, 1877.

MILLS COUNTY, IOWA, APPELLANT,
vs.
THE C., B. & Q. R. R. CO.; THE B. & M. R. R. CO., et al., appellees.

D. H. Solomon, L. W. Ross, and C. B. Lawrence, for appellant.

O. H. Browning, J. M. Walker, and Hale, Stone & Proudfit, for appellees.

AMENDMENT TO ABSTRACT, BY APPELLEES.

66 Since the cases numbered 6599 and 6603 have been pending in this court the parties in each have filed herein a stipulation as follows:

"It is agreed that said causes (6599 and 6603) shall be consolidated,

and that for such purpose counsel on both sides may use in common the abstracts of pleadings and evidence in both cases."

On January 13th, 1877, the following agreement was made and signed by the parties to both cases:

In the supreme court of Iowa.

MILLS COUNTY, IOWA,
vs.
THE B. & M. R. R. Co., C., B. & Q. R. R. Co., and others.

THE C., B. & Q. R. R. Co.
vs.
MILLS COUNTY, IOWA.

The parties to the causes above entitled hereby agree that the appellees in the cause first above entitled and the appellant in the cause last above entitled shall have until February 10th, 1877, in which to file abstract in the supreme court should they elect to do so, and until February 1st, 1877, in which to file arguments in the said causes. A like extension of time is also granted to the opposing party in each case from that now agreed upon by agreement on file in the office of the clerk of the supreme court of Iowa.

THE C., B. & Q. R. R. Co.,
B. & M. R. R. Co., ET AL.,
By HALE, STONE, & PROUDFIT,
Their Attorneys.
ROSS, SOLOMON & LAWRENCE,
Attorneys for Mills County.

Dated this January 13th, 1877.

67 Endorsed as follows:

JANUARY 17*th*, 1877.

Consent is hereby given to the times of the within agreement, and it is ordered that the abstract and arguments be filed pursuant thereto.

JAMES G. DAY,
Ch. J. Sup. Court.

The holding of the court on the demurrer filed April 30th, 1874, referred to on page 29 of plaintiff's abstract, is in the following words:

"February 27th, 1875. Now at this time this cause comes up on demurrer heretofore filed. After due consideration demurrer overruled. Def'ts duly except."

68 The list of lands referred to by witness D. M. Mitchell, on page 196 of plaintiff's abstract, is as follows:

	Sec.	T'p.	R'ng.	A'c's.		Sec.	T'p.	R'ng.	A'c's.
NE. NE	3	73	40	36	SW. NE	11	71	41	40
S. ½ NE	3	73	40	80	SE. ¼	13	"	"	160
NE. NW	3	73	40	36	W. ½ NE	28	"	"	80
NE. SW	3	"	"	40	SE. NW	28	"	"	40
E. ½ SE	3	"	"	80	SE. SW	29	"	"	40
E. ½ NE	4	"	"	76	S. ½	32	"	"	320
SE. ¼	4	"	"	160	S. ½ SE	9	"	"	80
N. ½	5	"	"	307	N. ½ NW	11	"	"	80
NE. SE	5	"	"	40	W. ½ NW	15	"	"	80
W. ½ SE	5	"	"	80	SW. SW	6	71	42	40
E. ½ SW	7	"	"	80	69 W. ½ SW	6	71	42	79
NE. SE	7	"	"	40	NE. ¼	1	71	43	140
W. ½ NE	9	"	"	80	W. ½ SW	1	"	"	80
NW. ¼	10	"	"	160	E. ½ SE	1	"	"	80
E. ½ NE	11	"	"	80	NE. NW	2	"	"	29
NW. SE	11	"	"	46	W. ½ NW	2	"	"	68
N. ½ SE	17	"	"	80	NE. NE	4	"	"	27
S. ½ SW	21	"	"	80	S. ½ SE	4	"	"	80
SE. ¼	21	"	"	160	N. ½ NW	9	"	"	80
SW. SW	22	"	"	40	NE. SW	11	"	"	40
NE. SE	23	"	"	40	W. ½ SW	11	"	"	80
N. ½ SW	24	"	"	80	E. ½ NE. (except 25				
SE. ¼	24	"	"	160	acres east side	20	71	43	55
NE. ¼	25	"	"	160	NE. SW	23	"	"	40
N. ½ SW	25	"	"	80	SW. NE	27	"	"	40
SW. SW	25	"	"	40	SE. NW	27	"	"	40
NW. ¼	1	71	40	140	NW. SE	27	"	"	40
SW. ¼	1	"	"	160	SW. NE	34	"	"	80
SE. ¼	1	"	"	160	NE. ¼	21	73	40	160
NE. ¼	2	"	"	140	SE. NW	29	"	"	40
SW. ¼	3	"	"	160	NE. NE	31	"	"	40
S. ½	4	"	"	320	W. ½ NE	31	"	"	80
SE. ¼	9	"	"	160	S. ½ NW	31	"	"	75
NW. ¼	10	"	"	160	SE. SE	5	73	41	40
S. ½ NW. ¼	11	"	"	80	W. ½ NE	7	"	"	80
SW. ¼	11	"	"	160	SE. SW	7	"	"	40
SE. NE	12	"	"	40	W. ½ NW	7	"	"	69
S. ½ NE	13	"	"	80	W. h'f SW	7	"	"	69
SE. ¼	13	"	"	160	NE. SE	9	"	"	40
All	14	"	"	640	SW. NW	17	"	"	40
SE. ¼	15	"	"	160	SE. SE	17	"	"	40
NW. ¼	22	"	"	160	NW. SE	20	"	"	40
N. ½	23	"	"	320	SE. NE	21	"	"	40
NE. ¼	24	"	"	160	SW. NW	21	"	"	40
SE. ¼	24	"	"	160	SW. SW	28	"	"	40
E. ½	27	71	40	120	NE. SE	29	"	"	40
N. ½ NE	1	71	41	58	NE. NE	3	73	43	36
W. ½ SW	1	"	"	80	W. h'f NE	3	"	"	76
N. ½ SE	1	"	"	80	N. h'f NW	3	"	"	72
W. ½ SW. NE	2	"	"	20	S. h'f NW	3	"	"	89
SW. SW	2	"	"	40	NE. NE	13	"	"	40
W. ½ SW	6	"	"	83	W. h'f SE	23	"	"	80
NE. NE	7	"	"	40	SE. SE	23	"	"	40
N. ½ SE	25	73	40	80	SW. NE	26	"	"	40
SE. SE	25	"	"	40	NW. NW	13	"	"	40
E. ½ SW	27	"	"	80	N. h'f SE	34	71	43	80
N. ½	28	"	"	320	SE. SE	34	"	"	30
N. ½ SW	28	"	"	80	SE. NE	71	43	43	40
W. ½ SE	28	"	"	80	NE. SE	35	"	"	40
E. ½ NE	29	"	"	80	S. h'f SE	35	"	"	80
SW. NE	29	"	"	40	SW. SE	36	"	"	40
E. ½ SW	29	"	"	80	Lot 1. NE	1	71	44	21
SE. ¼	29	"	"	160	E. h'f NE	3	71	43	68
E. ½ NE	35	"	"	80	NW. ¼	3	71	43	135
E. ½ SE	35	"	"	80	E. h'f SE	3	71	43	80
NE. ¼	1	73	41	158	NW. NE	9	71	43	40
SE. NW	1	"	"	40	NE. ¼	7	73	42	160
E. ½ SW	1	"	"	80	N. h'f NE	17	"	"	80
SE. ¼	1	"	"	160	SE. NE	17	"	"	40
N. ½ NE	3	"	"	79½	S. h'f SW	17	"	"	80
E. ½ NW	3	"	"	79	E. h'f NE	19	"	"	80
SW. NE	11	"	"	40	E. h'f SE	19	"	"	80
NW. NW	11	"	"	40	SW. NW	11	73	43	40
E. ½ SW	11	"	"	80	NE. SE	13	"	"	40
SE. ¼	11	"	"	160	W. h'f SE	13	"	"	80
NW. SW	12	"	"	40	SW. SW	15	"	"	40
N. ½ NE	13	"	"	80	NE. NE	17	"	"	40
W. ½ NE	23	"	"	80	W. h'f NE	17	"	"	80
SE. NW	23	"	"	40	SE. NE	17	"	"	40
SW. ¼	9	73	40	160	NE. NW	20	"	"	40

	Sec.	T'p.	R'ng.	A'c's.		Sec.	T'p.	R'ng.	A'c's.
S. h'f NW	20	"	"	80	SE. SE	17	"	"	40
W. ½ SW	20	"	"	80	SE. NW	19	"	"	40
NW. NW	21	"	"	40	S. ½ NE	33	"	"	80
NE. SW	21	"	"	40	N. ½ NE	5	72	42	63
N. ½ SE	21	"	"	80	N. ½ NW	3	"	"	61
SE. SE	21	"	"	40	SE. NW	3	"	"	40
E. ½ NE	25	"	"	80	W. ½ SW	3	"	"	80
SE. NE	29	"	"	40	SE. SW	3	"	"	40
NE. NW	29	"	"	40	SW. NW	25	"	"	40
NE. SW	29	"	"	40	SW. ¼	25	"	"	160
NE. NW	32	"	"	40	NW. NW	35	"	"	40
S. ½ NE	33	"	"	80	S. ½ NW	3	72	42	80
NW. NW	33	"	"	40	NE. SW	3	72	42	40
NE. SW	34	"	"	40	NW. SE	3	"	"	40
NW. NE	18	"	"	40	NE. NW	3	72	40	29
NW. NW	19	"	"	41	NE. NE	5	"	"	26½
NE. SE	19	"	"	40	NE. NW	5	"	"	27
NE. NE	30	"	"	40	SW. SE & SE. SE	6	72	40	80
SW. NE	30	"	"	40	S. ½ NW	7	"	"	79
NE. NE	36	73	44	40	W. ½ SE	7	"	"	80
SW. NE	1	72	44	40	SW. ¼	8	"	"	160
SE. SW	4	"	43	40	E. ½ NW	17	"	"	80
SE. NE	5	"	"	40	E. ½	18	"	"	320
N. h'f	20	"	"	320	SE. NE	35	"	"	40
70 SW. ¼	20	72	43	160	SW. NW	24	72	41	40
SE. SE	20	"	"	40	NW. SW	24	"	"	40
NW. NE	33	"	"	40	NE. ¼	26	"	"	160
N. ½ NW	33	"	"	80	W. ½ SW	7	72	40	80
SW. NW	33	"	"	40	N. ½ NW	7	"	"	80
Lot 1, NE. NE	2	72	44	5	E. ½ SE	7	"	"	80
Lot 1, NE	11	"	"	16	N. ½ NE	19	"	"	80
E. ½ NW	12	"	"	80	NW. ¼	19	"	"	162
Lot 4, SW. SE	36	"	"	27					
W. ½ SE	17	72	43	80	Total				20,841

STATE OF IOWA, *Mills County, ss:*

I, Wm. H. Taft, treasurer of Mills County, Iowa, do hereby certify that the above and foregoing list of lands is a complete and perfect copy and transcript of the lands as they appear on the tax-books of said county for the year 1870, as the same now appears in my office.

Witness my hand and official signature this January 22, 1877.

WM. H. TAFT,
Treas. of Mills Co., Iowa.

STATE OF IOWA, *Mills County, ss:*

I, D. M. Mitchell, being duly sworn, state that the foregoing list of lands is the same referred to by me in my testimony in this case, an ab-
71 stract of which is given on pages 195 and 196 of plaintiff's abstract in this cause; that while I was on the stand I was requested by defendants' counsel to furnish a list of the same to the reporter, in order that the same might appear in the evidence; that I prepared said list in pursuance of such request; and, further, that the foregoing is a copy of said list so furnished.

D. M. MITCHELL.

Subscribed in my presence and sworn to before me by D. M. Mitchell this January 22, 1877.

[SEAL.]

S. V. PROUDFIT,
Notary Public.

STATE OF IOWA, *Mills County, ss:*

I, J. H. Brown, clerk of the district court of Mills County, Iowa, do hereby certify that the above and foregoing, from page 4 to 6, inclusive, is

a true, perfect, and complete transcript of the original, which latter now remains of record and on file in my office.

In testimony whereof I have hereunto set my hand and affixed my official seal. Done at Glenwood this January 25th, 1877.

[SEAL.] J. H. BROWN,
Clerk Dist. Court, Mills Co., Iowa.

The foregoing, from page 4 to 6, inclusive, was duly filed in the office of the clerk of the district court of Mills County, Iowa, on January 25th, 1877.

72 In the supreme court of Iowa, September term, 1876.

MILLS COUNTY, IOWA, APPELLANT,
vs.
THE BURLINGTON AND MISSOURI RIVER RAILROAD COMPANY et al., appellees.

Appeal from Mills district court.

D. H. Solomon, Chas. B. Lawrence, L. W. Ross, for appellant.
Hale, Stone & Proudfit and O. H. Browning, for appellees.
Kelley Brothers, for Otis E. Allis, appellee.

On the 29th day of January, 1874, said Mills County, Iowa, by D. H. Solomon, attorney, filed a petition in equity, making The Burlington & Missouri River Railroad Company, John M. Forbes, Henry P. Kidder, and John N. A. Griswold, parties defendant thereto, as follows:

73 The plaintiff and petitioner, Mills County, Iowa, in this her petition, states that the defendant, The Burlington & Missouri River Railroad Company, is a corporation in the State of Iowa, and known and doing business by and under the name and style of The Burlington & Missouri River Railroad Company.

2d. That by an act of Congress, entitled "An act making a grant of lands to the State of Iowa in alternate sections, to aid in the construction of railroads in said State," approved May 15, 1856, certain lands, interests, rights, powers, and privileges were thereby conferred upon the State of Iowa, to aid in the construction of a railroad from Burlington, on the Mississippi River, to a point on the Missouri River near the mouth of the Platte River, and for other purposes. That so much of said lands, interests, rights, powers, and privileges as were granted and conferred under and in pursuance of said act of Congress to aid in the construction of said railroad, were by an act of the general assembly of the State of Iowa, entitled "An act to accept of the grant and carry into execution the trust conferred upon the State of Iowa by an act of Congress, entitled 'An act making a grant of lands to the State of Iowa, in alternate sections, to aid in the construction of railroads in said State,'" approved May 15, 1856, which was approved on the 14th day of July, 1856, granted and conferred upon the said Burlington & Missouri River Railroad Company, then as now being a body corporate, created and existing under the laws of the State of Iowa. That the said defendant, The Burlington & Missouri River Railroad Company, did within ninety days after the passage of said act of the Iowa general assembly, assent to and accept the provisions of said act in

the manner in which they were by said act required to do. That under and by virtue of these acts and grants of land, and other acts and grants, both by the general assembly of the State of Iowa and the Congress of the United States, the said defendant, The Burlington & Missouri River Railroad Company, has had and received acres of land donated to them for the purpose of aiding them in the building and completing of their said railroad over and above the lands in controversy herein. That in order to fix the particular parcels and tracts of the public lands that
74 were to be covered, included in, and granted by said land grant, the line and route of said road was required to be definately fixed and located, and by the Iowa act, on or before the first day of April next after the passage thereof, and the plaintiff avers that the final location of the line and route of said railroad through the county of Mills, as well as every other county through which it passed, was duly, legally, and definately fixed and determined, so as to secure to said defendant, The Burlington & Missouri River Railroad Company, the said lands, interests, powers, and privileges to them granted and conferred as is above stated, on the 24th day of March, 1857, and that this, the said defendant, The Burlington & Missouri River Railroad Company, became by such acceptance and location, bound under the obligations of a contract to the State of Iowa, and to all the people and the citizens thereof, and more especially those of the county of Mills, to build and construct its said road on said line and route through Mills County, as well as all the rest through which it passed.

3d. The plaintiff states that at an early day a conflict arose between plaintiff and the said defendant, The Burlington & Missouri River Railroad Company, in regard to the ownership of a large body of lands situated in Mills County, amounting in the aggregate to some 23,365 acres, a particular description of which is hereto attached as Exhibit A. That said lands described in said Exhibit A are of the class of lands known as swamp lands. That in an action heretofore tried in this court, wherein this plaintiff, Mills County, Iowa, was the plaintiff, and this defendant, The Burlington & Missouri River Railroad Company, was the defendant, this plaintiff, Mills County, Iowa, was, by a judgment and decree duly made and given, a copy of which is hereto attached and marked Exhibit B, declared to be the owner in fee-simple of said lands, and to be entitled to the uninterrupted control and use and enjoyment of the same, in which action the basis of the defendant's claim therein was said act of Congress, approved May 15, 1856, entitled "A bill making a grant of lands to the State of Iowa, in alternate sections, to aid in the construction of
75 certain railroads in said State," and said act of the general assembly of the State of Iowa, approved July 14, 1856, entitled "An act to accept the grant and carry into execution the trust conferred upon the State of Iowa by an act of Congress entitled 'An act making a grant of lands to the State of Iowa, in alternate sections, to aid in the construction of railroads in said State,'" approved May 15, 1856; an acceptance and compliance with its terms on the part of the defendant, The Burlington & Missouri River Railroad Company, of the duties, conditions, obligations, and privileges conferred and imposed by said Iowa act upon said company, and the location of the line and route of said railroad, and (certain certificates signed by the Commissioner of the General Land Office, certifying the lands in dispute in that action as inuring to the State of

Iowa for the use of the said Burlington & Missouri River Railroad Company, and said act of Congress of May 15, 1856—see amendment filed 17th of February, 1876, p. 447 of transcript) which claim of said railroad company, one of the defendants herein, was in that action adjudged and decreed to be illegal, null and void in regard to the lands in controversy in said former action of which Exhibit A hereto contains a list. That in said former action this plaintiff, as the plaintiff therein, claimed to be the owner of said lands by virtue of said act of Congress, approved September 28, 1850, entitled "An act to enable the State of Arkansas and other States to reclaim the swamp lands within their limits," and an act of the general assembly of the State of Iowa entitled "An act to dispose of the swamp and overflowed lands within the State, and to pay the expenses of surveying and selecting the same," passed January 13, 1853, and other acts of said general assembly supplementary thereto, and of an act of Congress entitled "An act to confirm to the several States the swamp and overflowed lands selected under the act of September 28, 1850, and the act of the 2d of March, 1849," approved March 3, 1847, selections duly made under said acts as swamp lands, and approved by the proper officers, all of which will fully appear, reference being made to Exhibits A and B hereto attached and the record to said former action. That said judgment
76 on appeal taken to the supreme court of the State of Iowa by the defendants therein was, at the June term thereof, 1867, affirmed, which judgment of affirmance by the supreme court of Iowa has never been reversed, modified, or changed, but was reaffirmed by the Supreme Court of the United States on the 7th day of February, 1870, having been on the 2d day of February, 1870, duly submitted, not upon any agreement to settle, but upon its merits and record, to abide the decision of a similar case which was contested fully on both sides, so that plaintiff says that all claims of said defendant, The Burlington & Missouri River Railroad Company, to the lands described in said Exhibit A which were and are based upon acts of Congress, and federal officers and State officer, in pursuance of such acts, have been by the courts of higher resorts duly adjudged to be and to have been null and void as to each and every parcel of said land.

4th. But the pl'ff states that notwithstanding the said decision of the supreme court of Iowa at the June term, 1867, and pending the said appeal to the Supreme Court of the United States, and just prior to the commencement of work upon their road-bed in Mills County, the said def't, The B. & M. R. R. Co., through its officers and agents, by means of scare lines and other fraudulent devices and pretences resorted to for the purpose of creating a fear in the minds of the people of Mills County, threatened that notwithstanding the said solemn contract with the State of Iowa to build and construct their said road on the line and route so definitely fixed by them as is herein above stated, unless other inducements were offered and given them the company would abandon its said line through Mills County and go to other rival points above or below line; that influenced and alarmed by said fraudulent practices, the then board of supervisors of Mills County, Iowa, did entertain a proposition for a contract affecting a great portion of the swamp lands of Mills County, Iowa, and those described in Exhibit A, in the fall of 1868, by the terms of which many of said lands without being described therein were to be

devoted and appropriated to said railroad company for the pur-
77 pose of securing the completion of said railroad through Mills County via Glenwood in said county, with the express condition that the contract should not be binding upon Mills County unless the said railroad company should complete said railroad through Mills County via Glenwood, and build a depot at Glenwood in said county, and providing, further, that the suit then pending (that above described) in the Supreme Court of the United States should be continued from term to term, by agreement of parties, until the conditions of the contract shall have been complied with, and conditioned still further that in case said railroad company shall fail or neglect to build said railroad through Mills County via Glenwood, and also build and establish a depot at Glenwood, in said county, then and in that event said lawsuit to stand for final hearing in the Supreme Court of the United States (a copy of which proposition for a contract is hereto attached and marked Exhibit X, and made a part of this petition; and pl'ff asks that said document attached to this amendment, and including the words "July 13, 1868," be considered and treated as such Exhibit X to the original petition and as a part thereof; and the pl'ffs aver that the above document referred to as Exhibit X is, as far as and including the words "July 13, 1868," a copy of the document referred to in the original petition by the words "proposition for a contract," which occur and are to be found in the 24th line of the 9th page of said original petition, 11 page of transcript, and that the balance of said exhibit are the signatures thereto and the action of the officers as found of record, and which are here added in order to comply with the order of court for more specific statements). See amendment filed 22d February, 1875, page 117 of transcript.

But pl'ff avers that said proposition and contract is and ever has been void, because they say that the lands which were the subject-matter thereof had, under and by virtue of the statutes above cited, vested in the county of Mills long prior thereto as swamp lands, and the same was a contract and proposition to devote certain of said swamp lands to the making of a railroad through the county of Mills, and none of said lands or proceeds thereof could be so devoted without the question whether the same
78 should be so devoted shall have been first submitted at some general or special election to the people of the county, and they say that up to and until the 19th day of June, 1871, the same had not been submitted.

5th. The pl'ff states that notwithstanding said proposition and contract had not been so submitted to a vote in pursuance of the terms of said void contract, the def't, the B. & M. R. R. Co., has induced certain persons, members of the board of supervisors of Mills County, to sign and deliver to said railroad company at different times what purported to be quit-claim deeds and describing divers tracts of swamp lands; one of which deeds bears date October 18, 1869; describes swamp lands to the amount or 6,260 $\frac{55}{100}$ acres, and is recorded in book 23, at page 173, of the deed records of said county, a copy of which, as it remains, of record is annexed hereto as Exhibit C, and is made part hereof.

Another, bearing date October 18, 1869, describes 1,960 acres swamp lands, recorded in book 23, page 177; copy attached hereto as Exhibit D.

Another bearing date January 4, 1870, describing 1,760 acres swamp

land, recorded in book 23, page 261; copy attached hereto as Exhibit E.

Another, bearing date September 6, 1870, describing 3,560 acres swamp land, recorded in book 13, page 310; copy attached hereto as Exhibit F.

Another, bearing date June 19, 1871, describes 240 acres swamp land, recorded in book 13, page 362; copy attached hereto as Exhibit G (see amendment filed 17th February, 1876, page 443), purporting to convey to said railroad company, in all, by these five deeds, 13,720 $\frac{55}{100}$ acres of land. Pl'ff avers and claims that said contract or proposition for a contract was and is void; that the same was obtained by fraud and misrepresentation that the said board of supervisors had no power or authority to make such a contract (nor had the persons signing said deeds any power or authority to sign and deliver said deeds, any or either of them, to said railroad company. (See amendment filed February 17, 1876, page 445 of transcript.) That said contract and deeds were and are without consideration, and are for that reason illegal and void. That the
79 said def't, the B. & M. R. R. Co., have thereby acquired no title to the lands embraced in either of the 5 deeds marked Exhibits C, D, E, F and G, but that notwithstanding the courts of highest resort have confirmed the title of Mills County, Iowa, to all the lands conveyed in each of said 5 deeds to the said railroad company, and pronounced that the claims of said railroad company thereto were groundless and utterly null and void, said deeds are a cloud upon the title of Mills County and calculated to deceive innocent bona fide purchasers.

6th. The pl'ff further shows that said supposed contract, so far as it may appear and be sought to be made to appear to have been a compromise of the suit then pending in the Supreme Court of the United States, was not by either party to said suit used or treated as a compromise or settlement thereof, for they say said suit was fully and stoutly contested by each party thereto and duly submitted for a final decision upon its record and merits, of which said supposed compromise did not constitute a part, and that the board of supervisors of Mills County had at the time no right, power, or legal authority to make such a compromise, involving as *as* it did a diversion of a trust fund and a surrender by agents of the whole of the subject-matter in controversy in a suit of their principal, and they aver that said proposition or contract was not a compromise of said suit, and that it was not and has not been so treated or regarded by either party, but was in reality merely a donation to said company upon the consideration that they would do what they were already under contract to do, and an attempt to devote the swamp lands and their proceeds to the building of a railroad through the county of Mills, and after the title thereto had already vested in Mills County and the highest court of the State of Iowa had so decided.

7th. The pl'ff says, farther, that after said deeds, which are attached hereto as Exhibits C, D, E, F, and G, had all been made, executed, delivered, and recorded at the September meeting of the supervisoirs of Mills County, Iowa, in the year 1871, an order for the submission of
80 the said contract between Mills County and the B. & M. R. R. Co., copy of which is hereto attached and marked Exhibit H, to the voters of Mills County, Iowa, at the ensuing general election, to be held on the 10th day of October, 1871, submitting to them the question whether the amount of swamp land specified in said contract and the proceeds thereof to the

amount of $10,000 should be devoted to the purposes set forth in said contract was made, and they aver that said order of submission was complied with and the vote was duly taken as directed, and that there were 1,388 votes cast at said election for and against affirming said contract so submitted, and that there were cast for affirming said contract but 357 votes, while there were 1,031 votes cast against affirming said contract; and so they aver that said proposition and contract was defeated and failed to be ratified and affirmed by Mills County, Iowa, one of the high contracting parties thereto, and the said proposed contract and all the said conveyances, including the deeds hereto attached as Exhibits C, D, E, F, and G, made in pursuance thereof, were repudiated and disaffirmed by the pl'ff, Mills County, Iowa, as soon as an opportunity was afforded to give an expression in regard to affirming or rejecting the same, and that for these reasons said contract and deeds should no longer be allowed to stand as clouds upon pl'ff's rights in regard to the lands described in said Exhibits C, D, E, F, and G, and pl'ff says there is no remedy at law adequate to pl'ff's protection and relief from these instruments, Exhibits C, D, E, F, and G, and that she can obtain full justice and guard and protect her rights in a court of equity only.

8th. Pl'ff farther states that she is informed and believes that the other def'ts, J. M. Forbes, Henry P. Kidder, and John N. A. Griswold, claim to have some interest in and to the lands described in said Exhibits C, D, E, F, and G, by, through, and under said deeds, and therefore makes them parties def't in order to bar any such claims.

81 PARAGRAPH II.—The pl'ff, Mills County, Iowa, as further cause of complaint and ground of relief and protection against these def'ts, and each of them, in this behalf says that a proposition to devote certain of the swamp lands and some of the proceeds of the sales thereof to the construction of the B. & M. R. R. through Mills County upon certain terms and conditions therein contained in the shape of a contract between said Mills County, Iowa, as one party thereto, and the B. & M. R. R. Co. as the other, was, by a resolution of the board of supervisors of said county at their September session, 1871, ordered to be submitted to the voters of Mills County at the next ensuing general election, to be held on the 10th day of October, 1871, the question whether the amount of swamp land specified in said contract, and the proceeds thereof to the amount of $10,000 shall be devoted to the purposes set forth in said contract, which is to be found on pages 265, 266, and 267 of minute-book B, of the records of said board, a copy of which order of submission is hereto attached as Exhibit H; that submission of said question was duly made in pursuance of said order, and the vote taken as directed on the 10th day of October, 1871; and that there were cast in favor of affirming said contract but 357 votes, and that there were cast against affirming the same 1,031 votes, thereby refusing to affirm by a large majority, to wit, a majority of 674, against affirming said contract; but notwithstanding these facts they aver that (after the official canvass of said vote on said contract was so made and declared) a clerical error was made in the record thereof in the election book. The record, so far as it related to said vote on said contract, reads as follows: " * * * and against ratification of the contract with the B. & M. R. R. Co. there were 1,388 votes cast. * * * For ratifying the contract with the B. & M. R. R. Co. 1,031 votes were

cast. Against ratifying the contract with the B. & M. R. R. Co. 357. * * * Against ratifying the contract with the B. & M. R. R. Co.," all of which will fully appear from the record of the general election for October, 1871, at which said vote on said contract was taken, and
82 pl'ff here expressly alleges that errors were made in said record, and the same should read as follows: " * * * For and against ratification of the contract with the B. & M. R. R. Co. there were 1,388 votes cast. * * * For ratifying the contract with the B. & M. R. R. Co. 357 votes cast. Against ratifying 1,031. * * * Against ratifying the contract with the B. & M. R. R. Co. (See amendment filed 17 February, 1876, page 445 of Transcript.) And the pl'ff says that she can have no adequate relief and remedy at law against such erroneous entries.

Pl'ff asks that all claims of the def't, the B. & M. R. R. Co., in and to the lands and each and every parcel thereof which are embraced in Exhibit A hereto, which are based upon and derived or claimed from any act or acts of Congress, any certificate or certificates of State or federal officers, and the location of their railroad, and which were in issue in the said action, wherein Mills County was pl'ff and the said company was def't, be declared to be res adjudicata and settled judicially against the said def't, The B. & M. R. R. Co., and in favor of Mills County, Iowa, and to have been fully and finally adjudicated and decided. That said proposition or supposed contract made and signed by the board of supervisiors of Mills County for Mills County, and the def't, The B. & M. R. R. Co., to be held and declared to have been obtained by fraud and circumvention on the part of said railroad company, to be not the contract of Mills County, and that Mills County is not bound thereby, and that the same was and is illegal and void. That the board of supervisors had no authority thereby to bind Mills County; that the 5 deeds, copies of which are hereto attached as Exhibits C, D, E, F, and G, made in pursuance of said contract are void, and that they are without consideration, made without authority or power in the board, and that the def't, The B. & M. R. R. Co., acquired no right, title, or interest whatever in and to the lands described in said deeds by virtue of either said contract or either of said deeds. That the said 5 deeds be held and declared each to have been made without authority and without consideration, and to have been obtained by fraud, and to be void, and to have been no conveyance of the lands or any parcel or tract thereof therein contained and described by Mills County, Iowa, not to be either of them the deed or act of
83 Mills County, and that the said railroad company and its assignees and grantees have acquired nothing thereby, and that the contract submitted to the voters of Mills County, Iowa, was not ratified or confirmed by such vote, but was by them dissented to and repudiated by Mills County at said election, and ask for a correction of the official record of the canvass of said vote, and that the same may be corrected so as to show that there were cast against affirming the said contract 1,031 votes at said election, and for affirming but 357, and that the def'ts, J. M. Forbes, H. P. Kidder, and J. N. A. Griswold, have acquired by virtue of any of said deeds or said contract no interest in or lien upon any of the lands described in any of the exhibits, and that the claims of these def'ts to any and all of said lands be declared to be groundless and void, and

for a judgment for costs in this behalf expended and for such other and further relief as to the court may seem just and proper.

EXHIBIT A.

Description.	S.	T.	R.
W. h. NE	5	72	40
NE. NE	"	"	"
N. h. NW. q	"	"	"
SE. NW	"	"	"
SW. SW	"	"	"
N. h	7	"	"
SW. q	"	"	"
E. h. SE	"	"	"
NW. q	17	"	"
N. h	19	"	"
E. h. NW	1	73	"
SW. q	"	"	"
W. h. NW	3	"	"
W. h. SW	"	"	"
Section No	9	"	"
S. h. SE	11	"	"
NE. NE. SE	"	"	"
W. h	15	"	"
SE. q	"	"	"
S. h. NE	"	"	"
E. h. SW	17	"	"
W. h. SE	"	"	"
SE. SE	"	"	"
Section No	21	"	"
E. h	29	"	"
NW. q	"	"	"
84 E. h. SW	29	73	40
NW. SW	"	"	"
W. h	31	"	"
SE. q	"	"	"
W. h. NE	"	"	"
NE. q	"	"	"
Section No	9	71	41
NW. q	11	"	"
W. h. SW	"	"	"
NW. NE	"	"	"
Section No	15	"	"
NE. NE	17	"	"
E. h	21	"	"
SW. q	"	"	"
SE. NW	"	"	"
W. h	27	"	"
W. h. NE	"	"	"
W. h. SE	"	"	"
SE. q	29	"	"
E. h. NE	"	"	"
E. h. NW	"	"	"
E. h. SW	"	"	"
NW. SW	"	"	"
SE. q. SE. h	31	"	"
E. h	33	"	"
SW. q	"	"	"
E. h. NW. q	"	"	"
NW. q. NW	"	"	"
SE. q	1	72	"
E. h. SW	"	"	"
S. h	13	"	"

Description.	S.	T.	R.
E. h. NE	13	72	41
NW. NE	"	"	"
S. h. NW	19	"	"
E. h	23	"	"
SW. q	"	"	"
E. h. NW	"	"	"
W. h	25	"	"
NE. q	27	"	"
E. h. SE	"	"	"
SW. q	29	"	"
E. h	35	"	"
SW. q	"	"	"
NW. NW	"	"	"
SW. SW	19	73	"
NE. q	1	"	42
N. h. SE	"	"	"
SW. q	"	"	"
NE. q	5	"	"
E. h. SW	"	"	"
E. h. NE	11	"	"
E. h. SE	"	"	"
NW. NW	31	"	"
E. h. NW	19	"	"
W. h. NE	"	"	"
W. h. SE	"	"	"
SE. SW	"	"	"
N. h. NE	25	73	42
NE. NW	31	"	"
SW. NE	"	"	"
NW. q	1	71	"
W. h. SE	"	"	43
N. h	3	"	"
SE. q	"	"	"
E. h. SW	"	"	"
NW. SW	"	"	"
NW. q	5	"	"
N. h. SW	"	"	"
S. h. NE	"	"	"
SE. q	"	"	"
W. h	9	"	"
W. h. NE	"	"	"
E. h. SE	"	"	"
N. h. NE	11	"	"
N. h. NW	"	"	"
S. h	17	"	"
W. h. NW	"	"	"
NE. NE	19	"	"
NW. q	21	"	"
W. h. SW	"	"	"
NW. NE	"	"	"
E. h	29	"	"
NW. NE	33	"	"
S. h. NE	"	"	"
SE. NW	"	"	"
SE. q	"	"	"
E. h. SW	"	"	"
W. h. SW	35	"	"

Description.	S.	T.	R.
SE. SW	35	71	43
SW. SE	"	"	"
W. h	5	72	"
W. h. NE	"	"	"
SW. NW	7	"	"
SW	17	"	"
W. h	19	"	"
Section No	21	"	"
SW. SW	23	"	"
Section No	27	"	"
E. h	29	"	"
SW. q	"	"	"
W. h. NW	"	"	"
E. h	31	"	"
E. h	33	"	"
W. h. NE	"	"	"
W. h. SE	"	"	"
E. h	25	"	"
S. h. NW	35	"	"
NE. q	5	73	"
N. h. NW	"	"	"
NW. SE	"	"	"
SE. SW	"	"	"
W. h	7	"	"
SE. q	"	"	"
W. h. NE	"	"	"
SE. NE	35	73	43
E. h. NW	17	"	"
S. h. SW	"	"	"
NW. NW	19	"	"
SW. NE	"	"	"
E. h. SE	"	"	"
W. h. NE	31	"	"
W. h. SE	"	"	"
Section No	1	72	44
Lot No. 1	11	"	"
NE. NW	13	"	"
W. h. NE	"	"	"
NW. SE	"	"	"
NE. SW	"	"	"
E. h. NW	25	"	"
W. h. NE	"	"	"
W. h. SE	"	"	"
NE. SW	"	"	"
NE. NE	1	73	"
S. h. SE	"	"	"
SE. SW	"	"	"
E. h. NE	13	"	"
NW. NE	"	"	"
NE. SE	"	"	"
Lot No. 2	23	"	"
" 3	"	"	"
" 1	27	"	"
NE. NW	35	"	"
Lot No. 1	"	"	"
" 2	"	"	"
" 3	"	"	"

All west of the 5th p. m., amounting in the aggregate to 23,325.87 acres.

85

EXHIBIT B.

MILLS COUNTY, IOWA,
vs.
THE B. & M. R. R. Co.

Now at this time this cause coming on to be heard and the court having heard and examined the allegations of the parties, the evidence submitted,

and the arguments of counsel, and being fully advised in the premises, find the facts stated in the petition and amended petition herein to be true, and that the pl'ff is entitled to the relief therein prayed for: It is therefore ordered, adjudged, and decreed by the court that the title in fee simple to the lands described in the pl'ff's amended petition, to wit: (Here follows the list of lands which are contained in Exhibit A of the petition, to which this is attached as Exhibit B, amounting in the aggregate to 23,325 87/100 acres), and every part and parcel thereof is legally vested in the pl'ff, Mills County, Iowa, and it is adjudged and decreed by the court that the said pl'ff is the owner in fee-simple of said lands and is entitled to the uninterrupted control, use, and enjoyment of the same, and it is further adjudged and decreed that the claim of the def't, to wit, the B. & M. R. R. Co., to said land and to each and every parcel thereof is illegal, null, and void, and it is further adjudged that the def't pay the costs of this suit, taxed at $41.15, and that execution issue therefor.

Read, approved, and signed April 17, 1866.

JAMES G. DAY, *Judge.*

86 EXHIBIT C.

For the consideration of one dollar, and for the purpose of carrying out the terms and stipulations of a contract heretofore made with the B. & M. R. R. Co., Mills County, State of Iowa, by her legal representatives and agents, does remise, release, and forever quitclaim to the said B. & M. R. R. Co. all her right, title, and interest in and to the following-described lands, situated in the county of Mills and State of Iowa, to wit:

Description.	S.	T.	R.	Description.	S.	T.	R.	Description.	S.	T.	R.
NE. NW	5	72	40	SW. NW	24	72	41	S. h. SW	35	71	43
NW. NE	"	"	"	NW. SW	"	72	41	SW. SE	35	71	43
S. h. SE	6	"	"	N. h. NE	26	72	41	NE. q	20	72	43
W. h. SE	7	"	"	SW. NE	"	72	41	E. h. NW	20	72	43
SW. q	8	"	"	SE. NE	"	72	41	E. h. SW	20	72	43
E. h.	18	"	"	NW. NE	1	73	42	SE. SE	20	72	43
E. h. NE	4	73	"	SE. SW	19	73	42	NE. NE	29	72	43
SE. q	"	"	"	W. h. NW	1	71	43	SW. SE	30	72	43
W. h. NE	9	"	"	E. h. NE	1	71	43	SE. SW	32	72	43
NW. q	10	"	"	NE. SW	2	71	43	NW. NE	18	73	43
W. h. SW	14	"	"	W. h. NW	2	71	43	SW. NE	19	73	43
E. h. SE	20	"	"	W. h. NE	3	71	43	NW. NW	19	73	43
SE. NE	"	"	"	NE. NE	4	71	43	NE. SE	19	73	43
S. h. SW	21	"	"	NW. NW	4	71	43	S. h. NW	20	73	43
SE. q	"	"	"	S. h. E	4	71	43	NE. NW	20	73	43
SW. SW	22	"	"	S. h. SE	5	71	43	W. h. SW	20	73	43
N. h.	28	"	"	N. h. NW	9	71	43	NE. NE	30	73	43
N. h. SW	"	"	"	NE. SW	17	71	43	SW. NE	30	73	43
W. h. SE	"	"	"	NW. SE	17	71	43	NE. SW	30	73	43
E. h. NE	29	"	"	SE. SE	17	71	43	Lot No. 1	2	72	44
SW. NE	"	"	"	NE. NE	18	71	43	" " "	11	72	44
E. h. SW	"	"	"	NW. SE	20	71	43	NE. NE	12	72	44
SE. q	"	"	"	SW. NW	21	71	43	E. h. NW	12	72	44
SW. SW	2	71	41	W. h. SW	21	71	43	SE. SW	12	72	44
SW. SW	10	"	"	NE. SE	29	71	43	SW. SE	12	72	44
SE. NW	11	"	"	Lot No. 1	31	71	43	NE. SE	36	72	44
W. h. NE	28	"	"	SW. NE	34	71	43	Lot No. 4	36	72	44
SE. NW	"	"	"	NW. NW	34	71	43	" " 2	23	73	44
SE. NE	32	"	"	N. h. SE	34	71	43	" " 3	23	73	44
S. h.	"	"	"	SE. SE	34	71	43	" " 1	26	73	44
SE. SW	33	"	"	NW. SW	35	71	43	NE. NE	36	72	44
W. h. SW., NE	2	"	"								

Containing in all 6,260 55/100 acres, be the same more or less.

In witness of which the said grantor hath hereunto set its seal,

87 and caused these presents to be singed by a majority of its board of supervisors, this 18th day of October, 1869.

[50 ct. rev. stamp.]

SAMUEL ALLIS.
BENNETT. CREECH.
FIELDEN UTTERBACH.
DAN'L C. BRIGGS.
MICHAEL D. LAMB.
SIMEON W. WILLIAMS.
BENJ. F. BUFFINGTON.
OLIVER C. FORESTER.

{ SEAL BOARD OF SUPERVISORS. }

STATE OF IOWA, *Mills County, ss:*

On this 18th day of October, A. D. 1869, before me, William D. Davies, a notary public in and for said county, personally came Samuel Allis, Daniel C. Briggs, Benj. F. Buffington, Bennett Creech, Michael D. Lamb, Oliver C. Forester, Fielden Utterbach, and Simeon W. Williams, personally to me known to be the identical persons whose names are subscribed to the above deed as grantors, and acknowledged the execution of the same as members of the board of supervisors of said Mills County, to be their voluntary act and deed for the purposes therein expressed.

Witness my hand and notarial seal hereunto affixed at my office in Glenwood, Iowa, the day and year above written.

[NOTARIAL SEAL.] WILLIAM D. DAVIES,
Notary Public.

EXHIBIT D.

For the consideration of one dollar ($1), and for the purpose of carrying out the terms and stipulations of a contract made with the B. & M. R. R. the Co., County of Mills, in the State of Iowa, does hereby remise, release, and forever quitclaim to the said B. & M. R. R. Co., all its right, title, and interest in and to the following lands, situated in the county of Mills, and State of Iowa, to wit:

Description.	S.	T.	R.	Description.	S.	T.	R.	Description.	S.	T.	R.
NW. q	5	71	43	E. h. SE	32	71	43	N. h. NE	33	72	43
N. h. NE	10	71	43	SW. q	17	72	43	NE. NW	33	72	43
E. h. NW	10	71	43	W. h. NW	20	72	43	W. h. NW	33	72	43
W. h. SW	17	71	43	W. h. SW	20	72	43	W. h. SW	33	72	43
SE. SW	17	71	43	W. h. NW	29	72	43	SE. SW	33	72	43
SW. SE	17	71	43	W. h. SW	29	72	43	E. h. NW	17	73	43
E. h. SE	20	71	43	W. h. NW	32	72	43	E. h. SW	17	73	43
W. h. NW	28	71	43	W. h. SW	32	72	43	E. h. NE	20	71	43
NW. SW	28	71	43								

Containing in all 1,960 acres, more or less.

88 In witness of which the said grantor hath hereunto set its seal, and caused these presents to be signed by a majority of its board of supervisors, this 18th day of October, A. D. 1869.

[50 ct. rev. stamp.]

SAMUEL ALLIS.
OLIVER C. FORESTER.
DAN'L C. BRIGGS.
FIELDEN UTTERBACH.
BENJ. F. BUFFINGTON.
SIMEON W. WILLIAMS.
MICHAEL D. LAMB.

{ SEAL BOARD OF SUPERVISORS. }

STATE OF IOWA, *Mills County:*

On the 18th day of October, A. D. 1869, before me, William D. Davies, a notary public in and for said county, personally came Samuel Allis, Dan'l C. Briggs, Benj. F. Buffington, Michael D. Lamb, Oliver C. Forester, Fielden Utterbach, and Simeon W. Williams, personally to me known to be the identical persons whose names are subscribed to the above deed as grantors, and acknowledged the execution of the same as members of the board of supervisors of said Mills County to be their voluntary act and deed, and for the purposes therein expressed.

Witness my hand and notarial seal hereto affixed, at my office in Glenwood, Iowa, the day and year above written.

[NOTARIAL SEAL.] WILLIAM D. DAVIES,
Notary Public.

EXHIBIT E.

Know all men by these presents that for the consideration of one dollar, and in consideration of and in furtherance of a settlement of the swamp-land suit between the County of Mills and the B. & M. R. R. Co., the County of Mills, by her lawfully constituted agents, to wit, the
89 members of the board of supervisors of said county, now in regular session on the 4th day of January, 1870, do hereby sell, convey, release, and forever quit-claim unto the B. & M. R. R. Co. the following real estate, situated in Mills County, to wit:

Description.	S.	T.	R.	Description.	S.	T.	R.	Description.	S.	T.	R.
NE. NE	5	72	40	N. h. NE	23	72	41	SW. SE	26	72	41
SW. NE	"	"	"	SW. NE	"	"	"	E. h. NE	33	71	"
SE. NW	"	"	"	E. h. NE	31	"	43	SE. SW	15	"	"
SW. SW	"	"	"	E. h. SE	"	"	"	W. h. SE	"	"	"
SW. q	6	"	"	W. h. NE	24	"	41	E. h. SW	29	"	"
NE. NE	7	"	"	NW. NW	"	"	"	W. h. SE	"	"	"
S. h. NW	"	"	"	SE. NW	"	"	"	E. h. SW	1	73	42
NW. SE	17	73	"	NE. SW	"	"	"	NE. NW	31	"	"
SW. q	13	72	41	N. h. SE	26	"	"	SE. SW	26	72	43

In witness whereof we, the members of the board of supervisors, now in regular session, do hereby set our hands this 4th day of January, 1870.

[50 ct. U. S. rev. stamp.]

HENRY LLOYD.
D. M. WHITFIELD.
B. F. BUFFINGTON.
SAMUEL HARRISON.
LEWIS ROBBINS.
JOHNSON ORR.
SAMUEL ALLIS.
W. G. TEMPLETON.
NATHAN KERNEY.
BENNETT CREECH.

STATE OF IOWA, *Mills County:*

On this 6th day of January, A. D. 1870, before me, clerk of the district court in and for said county, personally appeared Johnson Orr, Sam-

uel Allis, W. G. Templeton, Nathan Kerney, Bennett Creech, Henry Lloyd, D. M. Whitfield, B. F. Buffington, Samuel Harrison, and Lewis Robbins, personally to me known to be the persons whose names appear to the foregoing deed and members of the board of supervisors of said county and a majority of said board, and acknowledged that they signed and executed the foregoing deed as members of the board of supervisors of said county, and that the same is their voluntary act and deed.

Witness my hand and seal of said court, affixed at Glenwood, this date last above written.

[SEAL.] T. P. BALLARD, *Clerk.*

90 EXHIBIT F.

Know all men by these presents that the county of Mills, in the State of Iowa, by her legal representatives, the members of the board of supervisors of said county, at their regular September meeting for the year 1870, in furtherance of a settlement of a lawsuit pending in the Supreme Court of the United States, wherein the said county of Mills is pl'ff and the B. & M. R. R. Co. is def't, and for the further consideration of one dollar, do hereby sell, convey, and forever quitclaim unto the said B. & M. R. R. Co. all the right, title, and interest of the said county of Mills in and to the following described real estate, being and lying in the county of Mills and State of Iowa, to wit:

Description.	S.	T.	R.	Description.	S.	T.	R.	Description.	S.	T.	R.
N. h. NW	7	72	40	NE. SW	33	71	41	SE. SE	29	71	43
W. h. SW	"	"	"	W. h. SW	"	"	"	NE. NE	5	72	"
E. h. SE	"	"	"	E. h. SE	"	"	"	NW. SE	17	"	"
NW. q	19	"	"	W. h. SE	"	72	"	S. h. SE	"	"	"
N. h. NE	"	"	"	SE. NE	23	"	"	SE. NW	19	"	"
SW. q	9	73	"	NE. SE	"	"	"	NW. SW	27	"	"
NE. q	21	"	"	NW. NW	13	73	42	W. h. NE	29	"	"
NW. SE	22	"	"	W. h. NE	19	"	"	W. h. NE	31	"	"
SE. NW	29	"	"	W. h. SE	"	"	"	W. h. SE	"	"	"
N. h. NE	31	"	"	W. h. SE	1	71	43	S. h. SE	33	"	"
SW. NE	"	"	"	E. h. NE	3	"	"	NW. NW	35	"	"
S. h. NW	"	"	"	NW. q	"	"	"	W. h. NE	1	"	44
S. h. SE	9	71	41	SE. q	"	"	"	W. h. NE	13	"	"
N. h. NW	11	"	"	SE. q	5	"	"	NE. NW	"	"	"
W. h. NW	15	"	"	NW. NE	9	"	"	NW. SE	"	"	"
SE. SE	31	"	"	NE. SE	17	"	"	NE. NE	36	"	"

In testimony whereof we, a majority of the board of supervisors of said county, have hereunto set our hands this 6th day of September, A. D. 1870.

[50 ct. U. S. rev. stamp.]

W. G. TEMPLETON.
SAMUEL ALLIS.
LEWIS ROBBINS.
BENNETT CREECH.
HENRY LLOYD.
D. M. WHITFIELD.
B. F. BUFFINGTON.
JOHN ASQUIG.
NATHAN KERNEY.

STATE OF IOWA, *Mills County*:

On this 6th day of September, 1870, before me, H. C. Watkins,
91 a notary public in and for said county, personally appeared Samuel Allis, John Asquig, Nathan Kerney, Bennett Creech, D. M. Whitfield, W. G. Templeton, Lewis Robbins, Henry Lloyd, and B. F. Buffington, personally to me known to be the persons whose names appear to the foregoing deed as grantors, and a majority of the members of the board of supervisors of Mills County, Iowa, and acknowledged the execution and signing of said deed to be their voluntary act and deed, and for the uses and purposes therein mentioned.

[NOTARIAL SEAL.] H. C. WATKINS,
Notary Public.

EXHIBIT G.

Know all men by these presents that for the consideration of one dollar, and for the purpose of carrying out the terms of the agreement to settle the swamp land suit heretofore pending between the county of Mills and the B. & M. R. R. Co., the said county of Mills does hereby remise, release, and forever quitclaim to the said B. & M. R. R. Co. all her right, title, and interest in and to the following described lands, situated in the county of Mills, State of Iowa, to wit: E. ½ NE. 17, 72, 40, W. ½ SW. 28, 71, 41, W. ½ SW. 1, 71, 43, containing in all two hundred and forty acres, more or less, according to the U. S. survey.

In witness whereof the said grantor hath hereto set its seal and caused these presents to be signed by its board of supervisors this 19th day of June, A. D. 1871.

[50 ct. U. S. rev. stamp.]

B. F. BUFFINGTON,
BENNETT CREECH,
Comprising the Board of Supervisors of Mills County, Iowa.

STATE OF IOWA, *Mills County*:

Be it known that on this the 19th day of June, 1871, before me, the undersigned, notary public within and for the county and State aforesaid, personally appeared B. F. Buffington and Bennett Creech, personally to me known to be the identical persons whose names are subscribed to the foregoing deed as members of the board of supervisors of the grantor, the county of Mills, therein named, and being a majority of said board, and severally acknowledged the execution of said deed as their free and voluntary act and deed.

Witness my hand and seal notarial this 19th day of June, A. D. 1871.

[NOTARIAL SEAL.] H. C. WATKINS,
Notary Public, Mills County, Iowa.

92 EXHIBIT H.

Copy of the order of submission.

The following in relation to the submission of the question of contract with the B. & M. R. R. Co. was ordered and adopted, to wit:

Whereas, at the November session, 1868, of the board of supervisors of Mills County, Iowa, the proposition submitted to the B. & M. R. R.

Co., together with the acceptance of the same by said company, was confirmed and ratified by said board; and whereas the question of making the disposition of the swamp land funds therein proposed has never been submitted to the people, as required by law; therefore resolved by the board of supervisors of said county at the September session, 1871, and on the 5th day of said month, that there shall be submitted to the voters of Mills County at the ensuing general election, to be held on the 10th day of October, A. D. 1871, the question whether the amount of swamp land specified in said contract and the proceeds thereof to the amount of $10,000 shall be devoted to the purposes set forth in the following contract, to wit: (See contract on pages 265, 266, and 267 of this book.) Further resolved that the ballots cast at said election in the determination of said questions shall have written or printed or partly written and partly printed thereon either the words, "For ratifying the contract with the B. & M. R. R. Co.," or "Against ratifying the contract with the B. & M. R. R. Co." Further resolved that the auditor be directed to have these resolutions published in the Glenwood Opinion and Mills County Chronicle from this time until election.

Exhibit X.

In order to settle and finally adjust the lawsuit now pending in the Supreme Court of the United States, wherein Mills County, in the State of Iowa, is pl'ff, and the B. & M. R. R. Co. is def't, and secure the completion of the said road through Mills County, via Glenwood, in said County, we, the authorized agents of said county, submit the following proposition to the board of directors of said railroad company, to wit:

There are in dispute between the parties to the said lawsuit twenty-three thousand three hundred and sixteen acres. For the purpose of having our proposition understood, we acknowledge that we owe you acres of land to the amount of 23,316; to pay which we have and offer you odd sections, vacant (most of which is a part of the 23,316 acres), and even sections patented to the county and unsold, in the aggregate, 9,080 93 acres; balance of the land due you, 14,236 acres. For further payment, we have and offer to you, of the odd sections (about all of which is of the 23,316 acres claimed by you), subject to pre-emption made through the county, acres to the amount of (on which nothing has been paid to the county) 4,660. Of these pre-empted lands, we estimate that about one-half of the pre-emptions are fraudulent, and ought not to be recognized, but the county must ask that where bona fide improvements have been made on the same the pre-emptors must be secured in their right to the same, and have the privilege of purchasing at $1.25 per acre, of the county or company, which amount shall, in any event, go to the railroad company. Now you will have land for land, subject only to the pre-emptors' claims, until there will be due you in acres 9,576.

The remainder, 9,576 acres, belong to bona fide settlers and purchasers, who, we must insist, shall be protected by the county; and as we have paid you all the land we have, we offer you for this balance ten thousand dollars in money.

The company should understand that the balance of 9,576 acres is the land portions of which it has been settling with our individual citizens

for, and there is included in the 9,576 acres all the lands the company has sold to citizen settlers, at $1.25 per acre. With this understanding, the $10,000 we offer you will be just as much less than 9,576 acres as the company has thus sold, and therefore our pay would perhaps amount to $1.50, or more.

It is understood that the suit now pending shall be continued, by agreement of the parties, from term to term, until the conditions of this contract or proposition shall have been complied with.

It is also further understood that the foregoing proposition shall not be binding on the county of Mills unless said railroad company shall complete said railroad through Mills County via Glenwood, and build a depot at Glenwood, in said county; and in case said railroad company shall fail or neglect to build said railroad through Mills County via Glenwood, and also to build and establish a depot at Glenwood, in that county, then, and in that event, the said lawsuit shall stand for final hearing in the Supreme Court of the United States, the same as if this proposition had never been made. In case the suit shall be settled on the basis of this proposition, each party shall pay their own costs. The manner of transferring the land, whether the county shall deal with the purchasers and pre-emptors, or whether the railroad company, under the restrictions indicated, the county is not particular about, but will agree to what may seem most practicable.

94 The amount in acres, as stated above, may not be exactly correct, and probably is not, but it is believed to be nearly so, but we wish it understood that the company shall have all the swamp lands the county now holds or is entitled to in Mills County, Iowa, subject only to the conditions indicated in the foregoing. Witness our hands this July 13, 1868.

WM. HALE,
E. C. BOSBYSHELL,
D. H. SOLOMON,
L. W. TUBBS,
Majority of the Committee.

BURLINGTON, IOWA, *October* 27, 1868.

This proposition is hereby accepted, and the terms, stipulations, and conditions are agreed to by the Burlington and Missouri River Railroad Company.

BURLINGTON AND MISSOURI RIVER RAILROAD COMPANY,
By C. E. PERKINS, *Sup't.*

Notice of the acceptance of the within proposition by the Burlington and Missouri River Railroad Company has been served on us this 31st day of October, 1868.

D. H. SOLOMON,
E. C. BOSBYSHELL,
WM. HALE,
L. W. TUBBS,
Committee.

After giving the report due consideration, it is resolved by the board of supervisors of Mills County, Iowa, at their regular session in November,

1868, that the proposition submitted to the B. & M. R. R. Co., by our special railroad committee, and the acceptance of the same by the said company be, and the same is hereby, confirmed and ratified, and that the same be spread upon the records of this board.

The ayes and nays being called for, the vote stands as follows:

Ayes—Allis, Forrester, Haynie, Lamb, Utterback, Wing, Ward, Russell, Summers, and Mr. Chairman. Nays—none.

Original notice.

To the B. & M. R. R. Co., John M. Forbes, Henry P. Kidder, and John N. A. Griswold:

You, and each of you, are hereby notified that there is now on file in the office of the clerk of the district court of Mills County, Iowa, a petition of Mills County, Iowa, asking for a decree against you, declaring that a certain contract purporting to have been made between Mills County, Iowa, by the board of supervisors of said county, and you, the B. & M. R. R. Co., at the November term, 1868, of said board, in regard
95 to certain swamp lands of Mills County, and the proceeds of the sales thereof is void, and that the five deeds made in pursuance of said contract, purporting to convey to you, said B. & M. R. R. Co., and signed by the board of supervisors of said Mills County, the following tracts and parcels of land situated in Mills County, Iowa, to wit: (Here follows list of lands, see Exhibits A, C, D, E, F, and G, to the original petition), are also void, and that the county of Mills is still the owner of said land, notwithstanding said deeds, asking to correct a mistake made in the record of official canvass of the vote on said contract, and to bar any claims that you, the other def'ts, may have in and to said lands by virtue of such contract, deeds, and vote, and for other equitable relief, and that unless you appear thereto and defend before noon of the second day of the next term of the district court of Mills County, Iowa, which is to be begun and held at the court-house in Glenwood, Mills County, Iowa, on the 9th day of February, 1874, default will be entered and judgment thereon rendered against you pro confesso.

D. H. SOLOMON,
Att'y for Pl'ff.

Return.

This notice came into my hands Jan. 29, 1874, and on the same day I served it on the within named def't, the B. & M. R. R. Co., by reading the same to William Kempton, an agent of said company, at Glenwood, Mills County, Iowa, and delivering to him personally a true copy thereof, John M. Forbes, Henry P. Kidder, and John N. A. Griswold not being found in said county. All done in Glenwood Township, Mills County, Iowa.

J. M, EVANS,
Sheriff of Mills County, Iowa.

Amendments to petition.

And on the 27th day of August, 1874, pl'ff filed amendment to petition

as follows: (See page 67 of transcript.) As an amendment to the petition heretofore filed herein, pl'ff claims of and from the def't, the B. & M. R. R. Co., the sum of 5,000, which she alleges to be due her from the said def't, and for cause of such claim states that the said def't, the B. & M. R. R. Co., have had and received, collected, and converted to their own use at divers times divers sums of money which belong to this pl'ff as proceeds of the sales of swamp lands, amounting in
96 the aggregate to the said sum of $5,000, but the exact amount thereof this pl'ff has been unable to ascertain, and the names of the persons by whom the said amounts were paid and the amounts and dates of payment, and the description of the lands on which the same was so paid this pl'ff has not been able fully to ascertain. Pl'ff states that the sum of $1,675 thereof was received by said def'ts at the dates and in the amounts, and from the persons, and on the lands as set forth and described in an exhibit which is hereto attached and marked Exhibit M. Pl'ff states further that the money so had and received by the said def's were and are proceeds of the sales of swamp and overflowed lands described in the petition to which this is an amendment, and that the said lands as set forth and described in an exhibit which is hereunto attached and marked Exhibit M. Pl'ff states further that the money so had and received by the said def't were and are proceeds of the sales of swamp and overflowed lands described in the petition to which this is an amendment, and that the said lands and the proceeds of the sales thereof, as well as the lands which are conveyed by quitclaim to the said def't, the B. & M. R. R. Co., as set forth in the original petition herein, were and are a trust property and fund belonging to this pl'ff as trustee, and that this def't, the B. & M. R. R. Co., were, at the dates of the transactions described in the original petition and this amendment, charged with a full knowledge of the nature of said trust, and that the same was an unlawful diversion of a trust fund. Pl'ff prays, therefore, that the said def't, the B. & M. R. R. Co., be required to make a full exhibit of the exact amounts of the funds and monies so received by them, giving the dates of receipt, the amounts and the names of the persons from whom the same were so received, and the description of the lands on which said amounts were so paid, and that the said def't pay back to the pl'ff all of said sums of money; that they, the said def'ts, be held and declared to hold the same for Mills County in trust, and for judgment against the said def't, the B. & M. R. R. Co., for the full amount above claimed of $5,000, or so much thereof as shall be found due and owing to them, and pl'ff reiterates the prayer of her original petition.

97 EXHIBIT M.

	Names of parties.	Description of lands. Parts of sections.	S.	T.	R.	Amount.	Date of receipt. Month.	Day.	Year.
1	George Plumb	NE. NW. & NW. NE ...	29	73	40	$100 00	January ..	28	1870.
2	Valentine Plumb..	N. h. NW	31	73	40	100 00	"	28	"
3	Isaac Meadows ...	NW. SE	31	73	42	50 00	February .	2	"
4	John Haynie.....	N. h. SW. & SE. NW ...	9	71	43	150 00	"	9	"
5	A. R. Wright	W. h. NW	17	71	43	100 00	"	17	"
6	Daniel Rhodes....	NW. NW	11	71	43	50 00	March	8	"
7	H. H. Woodrow...	W. h. NE	27	71	41	100 00	June	25	"
8	Julius Barnes.....	SW. SE. & SE. SW.....	1	72	44	100 00	July	27	"
9	John Johnson.....	SW. NE. & NE. SW., NW. SE	27	72	43	150 00	"	15	"
10	George Pack.....	NE. SE. & SE. NE	33	71	43	100 00	August ...	6	"
11	W. G. Summers....	SW.	9	71	41	200 00	April	19	1871.
12	W. H. Henton	NE. SW	13	72	41	50 00	May	24	"
13	W. H. Taft.....	NE. SW. E. h., NW of SW	35	72	44	75 00	June.....	6	"
14	H. W. Summers..	N. h. NE & NW.....	9	71	41	300 00	April. ...	19	"
15	S. D. Davis	NW. SW	29	71	41	50 00	February .	9	1870.
						$1,675 00			

98 And on the 30th day of December, 1874, pl'ff filed amendment to petition as follows (see page 83 of transcript): Comes now the said pl'ff and amends her petition by adding to the style thereof the names of James W. Brooks and Alpheus Hardy as parties def't, and by inserting said names after the name of John N. A. Griswold, in the 8th subdivision of the first paragraph of the petition, and also after the name of said Griswold in the prayer of the petition; and said pl'ff further amends the petition by verifying the whole as set forth in affidavit appended (verified by affidavit of Lewis Robbins. See page 86 of transcript).

And on the 26th day of August, 1875, the pl'ff filed the following amendment to petition, (see page 203 of transcript): And now comes the said Mills County, pl'ff, and further amends the petition by making additional parties def't thereto, viz:

Samuel Masters, J. O. Munson, Daniel Henderson, Samuel Purcell, F. M. Thomas, H. Fischer, The Town of Hastings, W. H. Eckley, Peter Eckley, Robert McMath, N. B. Thompson, Albert Hurshey, Wm. McCoy, Henry Perry, J. A. Boswell, George W. Newman, Strahn & Evans (J. M. Strahn and John Evans), B. F. Pickerell, George Plumb, Jas. H. McCabe, Norman Curtis, Emburt Petersen, Valentine Plumb, C. H. Darling, Samuel Starr, The Corporation of New Millery, George S. Wilson, Frank Hobbs, W. L. Roll, Wm. Antrim, Elias Antrim, J. Antrim, H. W. Summers, Chas. Ross, Josiah Wearin, S. G. Sidner, Eliza Van Kirk, Daniel Cavenaugh, Fred. Schoenig, L. Hanson, Thos. Wiles, A. H. Burger, Wm. E. Dean, E. W. Weeks, C. Epperson, W. Tressler, B. Gunsollier, Lucinda Wilson, George Morrow, T. S. Crewdson, D. H. Epperson, I. S. Wright, T. A. Wright, Aug. G. Sarge, Dennis Sheedy, Wm. Jones, John Haynie, J. V. Hinchman, T. Smith, J. S. Wright, P. L. Delashmut, John L. Buell, Lyman Cutler, J. Van Eaton, A. P. Cutler, Thos. Conner, James Queen, Jesse Buckingham, Benj. Buckingham, Adam Focht R. Carter, A. Critz, Giles Hinson, H. C. Watkins, John Johnson, O. E Allis, J. T. Hamilton, J. S. Runkles, Sherman L. Fletcher, Melissa J

Palmer, B. Glenn, J. F. Hendrie, Samuel Brothers, H. B. Jones, J. H. Fisher, S. D. Davies, E. Barnes.

99 And pl'ff here expressly reaffirms as against all the def'ts, including the additional def'ts aforesaid, all the matter contained in her original petition and in the several amendments thereto, including this amendment, and pl'ff here expressly states that she waives nothing of the matters heretofore averred, and pl'ff here further expressly avers that she is the owner in fee of all the lands described in her original petition and in this amendment thereto, but that she is now credibly informed and believes that the def'ts named in the body of this amendment and also in Exhibit X, hereto annexed, severally make some claim to the lands described in said exhibit set opposite their respective names therein adversely to the estate of pl'ff therein, which said claims and each of them are derived from a common source, and are all and singular junior and subject to the title of the pl'ff in and to the lands so claimed; and pl'ff here expressly refers to said Exhibit X, and makes it a part of this amendment.

(Exhibit X referred to above contains the names of aforesaid additional parties def't, and the description of the lands claimed by each. See page 210 of transcript).

Therefore pl'ff prays judgment and decree against all of the def'ts, as demanded in her original petition and in the amendments thereto; and further, pl'ff prays judgment and decree against the several additional def'ts named in the amendment, as follows: 1st. That the pl'ff's estate in the several tracts of land described in the said Exhibit X be established as against the adverse claims of the several def'ts whose names are set opposite said tracts respectively, and that said several def'ts be barred and forever estopped from having or claiming any right or title to said premises adverse to the pl'ff. 2d. That the pl'ff be given and granted, as against all of said additional def'ts, all other equitable relief, and that she have judgment for her costs herein expended.

(This amendment is duly verified).

And on the 7th day of February, 1876, pl'ff filed amendment to her petition as follows (see page 371 of transcript):

1st. Pl'ffs do here and now offer to the def'ts or any of them any
100 tax or taxes that may have been assessed, levied, or collected erroneously from them or either of them on any of the lands in controversy by reason of the same not being subject to taxation.

2d. That there is and for a long time has been needed funds with which to drain and reclaim swamp and overflowed lands in Mills County, Iowa, and that it will require all the funds that can be realized from the sale of all the lands in controversy to drain and reclaim the same, and make and establish the levees that are and will be needed for that purpose. Pl'ff reiterates all former statements and prayers herein made.

(This amendment duly verified.

On the 30th of April, 1874, the def'ts, by Hale & Stone, attorneys, filed the following demurrer to the petition (page 64 of transcript):

The def'ts demur to the petition herein for the reason that the facts stated in the petition do not entitle the pl'ff to the relief demanded.

On the 10th of December, 1874, Hale & Stone file disclaimer of ap-

pearance for certain def'ts as follows (page 80 of transcript): "Comes now Hale & Stone, attorneys for said company, and say that they have not appeared for the other def'ts herein, and that in so far as the demurrer herein indicates such appearance the said indicated appearance is withdrawn. The failure to bind our appearance for the company only was an oversight and inadvertance, and we have no authority to appear herein, and have not had, for any party save the B. & M. R. R. Co."

On the 16th of February, 1875, def'ts, by Hale & Stone, attorneys, filed the answer of John M. Forbes and Henry P. Kidder (page 102 of transcript): "Comes now the def'ts, John M. Forbes and Henry P. Kidder, and for answer herein for themselves alone say that the only interest they have ever had in the matters in controversy were as trustees under a certain mortgage, executed by the B. & M. R. R. Co. on the 1st
101 day of October, 1863. That on the 31st of January, 1872, the def't J. M. Forbes resigned his said trust, and on the 19th of April, 1873, the def't H. P. Kidder resigned his said trust, both of which resignations were duly accepted by the proper party; they therefore disclaim all interest in the matter in controversy in this action."

(Answer duly verified.)

On the 16th of February, 1875, the def'ts Brooks, Hardy, and Griswold, by Hale & Stone, attorneys, filed the following demurrer (page 106 of transcript):

"Comes now the above named def'ts and demur to the petition herein and the amendments thereto, and as grounds thereof show to the court that the facts stated in the petition do not entitle the pl'ff to the relief demanded; wherefore these def'ts demand that as to them the petition be dismissed."

On the 13th of April, 1875, the def'ts, by Hale & Stone, attorneys, filed the following answer of the B. & M. R. R. Co. (page 126 of transcript):

The defts, the B. & M. R. R. Co., for its separate answer to the original petition herein, states:

1st. That it disclaims any and all interest in and to the lands in controversy in this action.

2d. That prior to the 31st of December, 1872, the said railroad company sold, by written contracts of purchase and sale, a large amount of the lands in controversy herein to persons who are not parties to this action.

3d. That in other cases it had sold and conveyed by proper deeds of conveyance a large portion of the lands herein involved to persons who are not parties to this action.

4th. That on the 31st of December, 1872, it sold, transferred, and set over to the C., B. & Q. R. R. Co. all its interest in and to the remaining portion of said lands, now sold as above specified; the said C., B.
102 & Q. R. R. Co. being a corporation duly organized under and by virtue of the laws of the State of Illinois; wherefore said def't asks to be dismissed with its costs.

(Answer duly verified.)

On the 13th of April, 1875, the def'ts, by Hale & Stone, attorneys, filed the following answer (page 131 of transcript):

The def't, the B. & M. R. R. Co., for answer to the pl'ff's amendment to the petition filed August 27, 1875, says it denies each and every allegation in said amendment contained.

On the 13th of April, 1875, the def't, by O. H. Browning and Hale & Stone, attorneys, filed the following answer of the C., B. & Q. R. R. Co. (page 134 of transcript):

Comes now the C., B. & Q. R. R. Co. and files this its separate answer, and respectfully states:

1st. That it denies each and every allegation contained in pl'ff's petition not hereinafter admitted or that may be inconsistent with this answer.

2d. Said def't alleges that it is the owner in fee simple of all the lands in controversy in this action, which had not been sold by the B. & M. R. R. Co. prior to December 31st, 1872, or which by its consent and direction have been sold by the B. & M. R. R. Co. since December 31st, 1872.

3d. That a particular description of the lands described in pl'ff's petition which had been sold by the B. & M. R. R. Co. before December 31st, 1872, and which have been sold since with the consent and by direction of the C., B. & Q. R. R. Co., is hereto attached and marked Exhibits A and B, and made part of this answer.

4th. To the lands therein described this def't disclaims title or claim and all interest therein, except such interest as it may have by a failure of those or some of those persons who purchased of the B. & M. R. R. Co. under contracts to convey, and who may fail to perform their contracts.

103 5th. That all the remaining portions of the land described in pl'ff's petition is the property of the C., B. & Q. R. R. Co. by purchase from said B. & M. R. R. Co. on the 31st day of December, 1872, as shown by the instrument of writing, selling, and conveying the same hereto attached and hereinafter more particularly referred to.

6th. That on the 13th day of July, 1868, there was pending in the Supreme Court of the United States a suit wherein Mills County, in the State of Iowa, was pl'ff and the B. & M. R. R. Co. was def't.

7th. That the lands in controversy in this action were, among others in controversy in said action, between the parties thereto.

8th. That long prior to the institution of said suit by Mills County, who is the pl'ff in this action, the said county had sold and conveyed, or contracted to convey, about 9,000 acres of the land in controversy in the suit that was pending in the Supreme Court of the United States, and undetermined on the 13th day of July, 1868.

9th. The said board of supervisors being in doubt as to the result of said suit, at a regular session held a short time prior to July 13th, 1868, did, of their own accord and without the knowledge of the said B. & M. R. R. Co., appoint a committee composed of D. H. Solomon, L. W. Tubbs, E. C. Bosbyshell, and Wm. Hale, who were all citizens of Mills County at that time, and did authorize them, the said committee, to submit a proposition to the proper authorities of said railroad company for a settlement and final adjustment of the matters in controversy, and at that time pending on appeal in the Supreme Court of the United States as aforesaid.

10th. That in pursuance of said appointment and authority conferred as aforesaid D. H. Solomon, E. C. Bosbyshell, and Wm. Hale did proceed to the city of Burlington, in said State of Iowa, and on the 13th of July,

1868, they did submit to the proper authorities of said railroad
104 company a proposition for a compromise, settlement, and final judgment of the matters in controversy then pending in said suit in the Supreme Court of the United States, a copy of which is hereto annexed, marked Exhibit C, and made a part hereof. (For copy of this exhibit see Exhibit X, page 21 of abstract.)

12th. That said proposition was made by said board of supervisors as aforesaid, in the city of Burlington, on the 13th day of July, 1868.

13th. That the same was respectfully entertained by the said B. & M. R. R. Co., and after due consideration the same was accepted, as made by said board of supervisors of Mills County, in due form, on the 31st day of October, 1868.

14th. That after said acceptance by said company as aforesaid, and due notice thereof given to said committee, the same was reported to said board of supervisors at the November session of said board, in the year 1868, and after giving the said report due consideration, the said contract was confirmed and ratified by said board and ordered to be spread upon the records of said board, a copy of which said order of said board is hereto attached, marked Exhibit "D," and made a part hereof.

15th. That in the adjustment and settlement of said contract according to the terms thereof and intention of the parties thereto, the said board of supervisors of Mills County, Iowa, appointed H. C. Watkins and Wm. Hale to investigate and report to them such pre-emptions held from the county of Mills as were bona fide, and also such other lands as should be deeded by the B. & M. R. R. Co. to the county under the contract as provided by the terms thereof.

16th. That said B. & M. R. R. Co. appointed, on the part of said company, D. N. Smith and H. A. Copeland, to represent said company in the adjustment and settlement of said contract, in accordance with the terms thereof and intention of the parties thereto.

105 17th. That said H. C. Watkins and Wm. Hale, on the part of Mills County, and said D. N. Smith and H. A. Copeland on the part of said B. & M. R. R. Co., did, after giving the matter a full investigation, carefully examine, ascertain, and adjust the rights of all those who claim some interest in said lands, whether by pre-emption or purchase, and afterwards reported the same to said board of supervisor', and the result so reached, after careful examination, was duly approved by said board, and deeds to said lands were accordingly made from said railroad company to Mills County, a list of which is given in Exhibit E, hereto attached.

18th. That said railroad company did, on its part, comply with all its promises and obligations under said contract.

19th. That in pursuance of the duties and obligations devolving on Mills County under said contract, said county, by its proper authorities, did convey to said B. & M. R. R. Co. all the lands mentioned and described in the deeds attached to pl'ff's petition.

20th. That said county, by its proper officers, having thus conveyed to said railroad company said lands, as aforesaid, did assess and levy taxes thereon, and did place the same on the proper tax-books, as lands owned by the said B. & M. R. R. Co., for the years 1870, 1871, 1872, 1873, and 1874, and that said railroad company has paid, and the county treas-

urer of Mills County has executed and issued to said railroad company proper tax receipts for the taxes so assessed and levied against said railroad company on said lands, in full, for the years 1870, 1871, 1872, and 1873, and in this way, and by these acts, said county of Mills has for several years recognized the said B. & M. R. R. R. Co. as the proper owner of said lands mentioned and described in the deeds attached to pl'ff's petition, and by said acts, in the assessment, levy, and collection of several thousand dollars from said railroad company as taxes on said lands, which was paid by said company, for the years aforesaid, into the treasury of said Mills County, for its use and benefit, and said county having
106 thus derived an advantage by thus receiving from said railroad company several thousand dollars as taxes, as aforesaid, to the disadvantage of said company, and having thus recognized said railroad company as the owner of said lands, under the deeds made by Mills County to said railroad company, under the contract before mentioned, said Mills County is forever estopped from setting up or claiming title to said lands from said railroad company or its grantees.

21st. That long prior to the making of said contract of settlement and compromise, by and between Mills County and the B. & M. R. R. Company, said county, by its proper officers, assessed and levied taxes on several thousand acres of land in controversy in this action.

22d. That several hundred acres of the said land was sold by said county for the taxes delinquent thereon so assessed and levied, as above stated, from which said tax sales the said B. & M. R. R. R. Co. applied to the auditor of Mills County and offered to redeem said lands from such tax sales, as aforesaid, as the owner thereof, and that said auditor, recognizing said B. & M. R. R. Co. as owner of said lands so sold for delinquent taxes, and therefore entitled to redeem the same from such tax sales, did receive from said railroad company the amounts at various times necessary to redeem the same, and did issue and deliver to said railroad company proper certificates of redemption of said lands from such tax sales, and in thus effecting such redemptions said railroad company paid large sums of money, and by the acts of the auditor of Mills County, in accepting said redemptions and recognizing the said B. & M. R. R. Co. as the owner of said lands, the said Mills County is further estopped from setting up or claiming title to the lands in controversy in this action, as against said B. & M. R. R. Co., or its grantee, a list of which said lands, so redeemed, is hereto attached, and marked Exhibit F, and made a part hereof.

23d. That the suit between Mills County, as pl'ff, and the B. & M. R. R. R. Co., as def't, which was, at the date of said compromise and settlement, pending in the Supreme Court of the United States on appeal
107 from the supreme court of the State of Iowa, the matters in controversy, which were by said settlement compromised and finally adjusted and settled, was not stoutly contested by each party thereto, as alleged by pl'ff in her petition herein, but, on the contrary, neither party gave the same any further attention whatever after the said contract of settlement was entered into, except to direct the continuance thereof from term to term, as provided in said contract, and that the same was, on February 7th, 1870, ordered, on the motion of the said court, in the absence of and without the knowledge of either of the parties thereto, or their at-

torneys, to be submitted and abide the decree of said court, in a case pending thereinbefore in said court, wherein Fremont County, in the State of Iowa, was pl'ff, and the B. & M. R. R. Co. was def't, and in which issues were involved similar to those in said case of Mills County against the B. & M. R. R. Co. That this action of the said court was without the knowledge or consent of either of the parties to said cause, and was therefore in contravention of the wishes and desires of the parties thereto, as expressed in said contract of settlement, and the subsequent acts and conduct of the parties in adjusting and carrying into effect and execution the said contract of settlement.

24th. That several thousand acres of the land in controversy in this action have been sold and conveyed by said B. & M. R. R. Co. to persons who are now citizens of Mills County, and who are now occupying and cultivating the same under such conveyances in good faith. That many of such deeds of conveyance have been spread upon the records of Mills County, and were so recorded prior to the institution of this action. That said Mills County has assessed and levied, by the proper officers thereof, taxes on many such lands so sold, as aforesaid, to persons who are grantees of the said B. & M. R. R. Co., and who hold and occupy said lands, under and by virtue of the contract of settlement and compromise between Mills County and said B. & M. R. R. Co. before mentioned, and said county has collected from such persons, who are grantees of the B. & M. R. R. Co., as aforesaid, large sums of money as taxes so assessed and levied on many of the lands described in the petition of pl'ff herein, and said pl'ff,
108 by such acts has held out to such persons, and all persons, that the title so held by said grantees of the B. & M. R. R. Co. was perfect and sufficient in both law and equity, and that by said acts and conduct of said Mills County said county has derived an advantage, to the disadvantage of other persons, and that said county is thus further estopped from asserting or claiming title to such lands, as against the B. & M. R. R. Co. or its grantees.

25th. This def't, the C., B. & Q. R. R. Co., relying in good faith on the deeds and conveyances set out in pl'ff's petition herein, which said deeds had been recorded in the proper recorder's office of Mills County, Iowa, did, on the 31st day of December, 1872, for a valuable consideration then paid, and before the institution of this action, and without notice of any of the matters set forth in pl'ff's petition, purchase of the B. & M. R. R. Co. all the lands in controversy herein that had not been sold by the said B. & M. R. R. Co. prior to the last named date, a copy of which deed of conveyance is hereto attached, and marked Exhibit G, and made a part hereof.

26th. And said def't, the C., B. & Q. R. R. Co., further answering the petition of pl'ff herein, says that the lands in controversy, in said suit between Mills County and the B. & M. R. R. Co., did, at the date of said compromise and settlement before mentioned, in truth and in fact belong to said company, and not to said county, and that said county at said date had no title thereto or legal or equitable interest therein; that they were not lands properly falling within the provisions of the act of Congress known as the Swamp-land grant, approved September 28th, 1850; that they were all odd-numbered sections of land, lying within the limits and boundaries, as provided by the act of Congress entitled an act "making a grant

of lands to the State of Iowa, in alternate sections, to aid in the construction of certain railroads in said State," approved May 15th, 1856, and which said lands were selected in pursuance of an act of the general assembly of the State of Iowa, passed July 14th, 1856, entitled "An act to accept of the grant and carry into execution the trust conferred upon the State of Iowa, by an act of Congress, entitled "An act making a grant of lands to the State of Iowa, in alternate sections, to aid in the construction of railroads in said State, approved May 15th, 1856," and in compliance with the requirements of section six of said act of the general assembly of the State of Iowa, above referred to, which section is in the words and figures following, viz:

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Section (1303, Rev.) 6. "The lines and routes of the several roads above described shall be definitely fixed and located on or before the first day of April next after the passage of this act, and maps or plots, showing such lines and routes, shall be filed in the office of the governor of the State of Iowa, and also in the office of the secretary of state of the State of Iowa. It shall be the duty of the governor, after fixing his official signature, to file such map in the department having the control of the public land in Washington, such location being considered final only so far as to fix the limit and boundary within which lands may be selected; and if it shall appear that the lands that have been donated by the act of Congress aforesaid, for the construction of the several lines above indicated, can not be obtained by said companies within the limits and along any part of the line aforesaid, the governor shall, from time to time, appoint agents to make such selections as may be authorized or granted by Congress for the lines aforesaid; but the compensation of such agents and the costs, expenses, and charges attendant upon and occasioned by making such selections, shall be afixed, regulated, paid, and borne by each of said railroad companies, respectively, upon and for its own line."

27th. And the def't, the C., B. & Q. R. R. Co., further says that the allegations in the petition, that the said B. & M. R. R. Co. were bound, as by a contract, with the State of Iowa, to build its line of road through Mills County, Iowa, by the way of Glenwood are not true, and they are hereby denied. The State of Iowa never made any contract with said B. & M. R. R. Co. by which the latter agreed to build its road upon any special, particular, or designated line. Nor did the State of Iowa ever require that the said road should be built upon any fixed or designated line. And this def't further alleges that the said State of Iowa specially exempted the said B. & M. R. R. Co. from building on any definitely fixed line, or any other line, by the act wherein it, the State of Iowa, accepted said grant. This def't further alleges that the grant of lands, by the act of Congress of May 15th, 1856, to the State of Iowa, to aid in the construction of railroads, was accepted by the State of Iowa, by an act of the general assembly of said State passed July 14th, 1856, as aforesaid. That by the terms of the said act of the general assembly, in said section six (6) thereof, the line of the said B. & M. R. R. Co. was to be definitely fixed and located on or before the first day of April thereafter; but that such location should be considered final only so far as to fix the limit and boundary within which the lands granted as aforesaid were to be selected; that the State of Iowa never, by any terms, conditions, or otherwise, required that said B. & M. R. R. should be built upon

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any particular or designated line, nor did the said railroad company ever agree with the State of Iowa to built upon any such line.

28th. That said lands had never been patented to the State of Iowa, by virtue of the laws of Congress granting the swamp and overflowed lands to the States, but on the contrary, the claim of the State of Iowa to said lands, as such swamp and overflowed lands, had been rejected by the Commissioner of the General Land Office, and by that officer said lands were certified in due form to the B. & M. R. R. Co. (which certification was duly approved by the Secretary of the Interior) as lands properly falling within the purview and meaning of the act of Congress aforesaid, approved May 15th, 1856, and which said lands had been selected, as aforesaid, with due reference to the line of said B. & M. R. R. located and definitely fixed, on July 25th, 1856. That after the location of said line, as aforesaid, with reference to which said lands were shortly thereafter selected, the same were in October, 1856, duly withdrawn from sale by the Secretary of the Interior for the benefit of said B. & M. R. R. Co., and subsequently certified to said company, as aforesaid; and this def't further says that the said B. & M. R. R. Co., claiming and believing itself to be the owner of said lands, had, in good faith, sold and disposed of many tracts thereof to persons who settled thereon and improved the same, and that said
111 company had bound itself to such persons to convey to them the titles to the lands so sold upon making payment of the purchase-money therefor; and that said Mills County had sold other tracts of said lands to other persons and in like manner had become bound to make conveyances therefor.

In this condition of things, the purchasers from the county and company, respectively, were anxious and uneasy about their titles to their homes, and the settlement of the country was being hindered and delayed by the doubts and fears which surrounded the title, persons not knowing whether to purchase from the county or the company; and for the purpose of putting an end to litigation, quieting the fears and apprehensions of purchasers, encouraging and facilitating the settlement of the country, and saving the county and the company from the delays, vexations, and expenses of continued and harrassing litigation to both parties, the pl'ff in said action, Mills County, made to the said company the said proposition for a compromise, which was accepted in good faith by said company as a compromise, and only as a compromise, and which was regarded and treated as a compromise by both parties and as nothing else, and which was carried into effect by both of said parties by making mutual conveyances to each other, in accordance with the terms thereof; and after said compromise had so been made and carried into effect, and said county had made, executed, and delivered deeds to said company, conveying to it most of the lands which, by the terms of said compromise, it had agreed to convey, said company gave no further attention to said suit then pending in the Supreme Court of the United States, believing that its title to said lands could not again be questioned or disturbed, whatever disposition might be made of said suit.

29th. And said def't further says that it is not true, as stated and charged in said petition, that said county was induced to offer and consum'ate said compromise, and to convey said lands to said company, by fraud and misrepresentation, and by running "scare lines" through said

county for the purpose of acting upon the fears of the people and influencing the action of the supervisors of said county.

112 30th. This def't, the C., B. & Q. R. R. Co., therefore prays that a decree be entered by this court, decreeing and forever quieting the title to the lands in controversy herein to and in this def't; that pl'ff's bill be dismissed, and for a judgment for costs.

(Said answer is duly verified.)

113 EXHIBIT A.

List of lands in controversy that had been sold by contract or deed of conveyance prior to December 31, 1872, by the B. & M. R. R. Co.

Parts of section.	S.	T.	R.	Date of sale.
NE. q. NE. q	5	72	40	November 3, 1870.
W. h. NE. q	"	"	"	September 5, 1870.
NE. q. NE. q	7	"	"	May 11, 1870.
E. h. NE. q	17	"	"	August 12, '72.
E. h. NE. q. and SE. q	4	73	"	May 9, '71; May 27, '72.
W. h. NE. q	9	"	"	January 4, '72.
W. h. SW. q	14	"	"	October 28, '70.
SE. q. NE. q	20	"	"	" 26, "
NE. q. SE. q	"	"	"	" " "
SE. q. SE. q	"	"	"	" " "
SE. q. NW. q	11	71	41	December 17, '63.
SE. q. SE. q	31	"	"	October 17, '71.
S. h	32	"	"	March 16, '71.
E. h. SE. q	33	"	"	August 29, '71.
E. h. SW. q	1	72	"	March 21, '64.
NW. q. NE. q	"	73	42	October 29, '70.
NE. q. NW. q	"	"	"	" 28, "
NW. q. NW. q	13	"	"	January 17, '70.
W. h. NE. q	19	73	"	January 27, '71.
SE. q. SW. q	"	"	"	October 24, '70.
W. h. SE. q	"	"	"	January 28, '71.
E. h. NW. q	1	71	43	July 15, '64.
W. h. NW. q	"	"	"	" " "
W. h. NE. q	3	"	"	January 30, '64.
SW. q. NE. q	5	"	"	October 27, '63.
SE. q. NE. q	"	"	"	" " "
N. h. SW. q	"	"	43	December 7, '63.
NW. q. SE. q	"	"	"	" " "
NE. q. SE. q	"	"	"	October 27, '63.
SW. q. SE. q	"	"	43	January 30, '64.
SE. q. SE. q	"	"	"	" " "
SW. q. NW. q	9	"	"	October 27, '63.
S. h. SW. q	"	"	"	" " "
E. h. SE. q	"	"	"	March 11, '64.
N. h. NE. q	11	"	"	January 30, '64.
NE. q. SW. q	17	"	"	" 29, "
N. h. SE. q	17	"	"	" " "
W. h. SW. q	"	"	"	November 6, '71.
SE. q. SW. q	"	71	"	August 26, '71.
SW. q. SE. q	"	"	"	" " "
SE. q. SE. q	"	"	"	October 27, '63.
NW. q. NW. q	21	"	"	" " "
SW. q. NW. q	"	"	"	" " "
NW. q. SW. q	"	"	"	" " "
SW. q. SW. q	21	"	"	January 29, '64.
SE. q. SE. q	29	"	"	October 27, '63.
N. h. SW. q	"	72	"	" 16, '73.
E. h. NW. q	17	73	"	January 29, '71.
E. h. SW. q	"	"	"	" 27, "
NE. q. NW. q	20	"	"	December 26, '71.
SW. q. SE. q	25	72	44	January 30, '64.

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EXHIBIT B.

Swamp selections in controversy sold and warranted by the B. & M. R. R. Co. since December 31st, 1872.

Part of sec.	S.	T.	R.	To whom sold by R. R. Co.	Date of sale.	Acres.	Date of quit-claim Mills Co. to B. & M.
NE. NW	5	72	40	D. Henderson..	January 3, 1873	26.80	October 18, '69.
NE. NW	"	"	"	" "	" "	40	January 6, '70
NE. SE	7	"	"	Strahn & Evans.	October 27, 1874	40	Sept. 6, '70.
NW. SE	"	"	"	" "	" "	40	October 11, '69.
SW. SE	"	"	"	" "	" "	40	" "
SE. SE	"	"	"	" "	" "	40	" "
NE. SW	8	"	"	F. M. Thomas.	Sept. 2, "	40	" "
NW. SW	"	"	"	"	" "	40	" "
SW. NW	"	"	"	"	" "	40	" "
SE. SW	"	"	"	"	" "	40	" "
NE. NE	18	"	"	Jno. Evans, jr..	" 1, "	40	" "
NW. NE	"	"	"	"	" "	40	" "
SW. NE	"	"	"	"	" "	40	" "
SE. NE	"	"	"	"	" "	40	" "
NE. SE	"	"	"	"	" "	40	" "
NW. SE	"	"	"	"	" "	40	" "
SW. NE	"	"	"	"	" "	40	" "
SE. SE	"	"	"	"	" "	40	" "
NE. NE	19	"	"	Strahn & Evans.	October 24, "	40	Sept. 6, '70.
NW. NE	"	"	"	" "	" "	40	
NE. SW	9	73	"	H. B. Thompson.	Decemb'r 8, 1873.	40	February 6, '70.
NW. SW	"	"	"	" "	" "	40	" "
SW. SW	"	"	"	Wm. McCoy....	Nov. 17, "	40	" "
SE. SW	"	"	"	" "	" "	40	" "
NE. NW	10	"	"	Jno. Whiteside	March 4, 1874.	40	October 18, '75.
NW. NW	"	"	"	"	" "	40	" "
SW. NW	"	"	"	"	" "	40	" "
SE. NW	"	"	"	"	" "	40	" "
NW. SE	17	"	"	G. W. Newman.	January 15, "	40	January 6, '70.
NE. NE	21	"	"	Strahn & Evans.	April 16, 1873...	40	Sept. 6, '76.
NW. NE	"	"	"	" "	" "	40	" "
SW. NE	"	"	"	" "	" "	40	" "
SE. NE	"	"	"	" "	" "	40	" "
SW. SW	"	"	"	" "	January 9, '74..	40	October 18, 69
SE. SW	"	"	"	" "	" "	40	" "
NE. SE	"	"	"	" "	April 16, '73....	40	" "
NW. SE	"	"	"	" "	" "	40	" "
SW. SE	"	"	"	" "	January 9, '74..	40	" "
SE. SE	"	"	"	" "	" "	40	" "
SW. SW	22	"	"	J. H. McCave..	August 14, '73..	40	" "
NE. SE	"	"	"	W. Coppock....	February 13, '74	40	Sept. 6, '70.
NE. NE	28	"	"	Strahn & Evans.	June 9, '74.....	40	October 18, '69.
NW. NE	"	"	"	" "	" "	40	" "
SW. NE	"	"	"	" "	" "	40	" "
SE. NE	"	"	"	" "	" "	40	" "
NE. NW	"	"	"	" "	" "	40	" "
115 NW. NW	28	73	40	Strahn & Evans.	June 9, '74.....	40	October 8, '69.
SW. NW	"	"	"	" "	" "	40	" "
SE. NW	"	"	"	" "	" "	40	" "
NE. SW	"	"	"	" "	" "	40	" "
NW. SW	"	"	"	" "	" "	40	" "
NW. SE	"	"	"	" "	August 23, '73..	40	" "
SW. SE	"	"	"	" "	" "	40	" "
NE. NE	29	"	"	" "	June 9, '74.....	40	October 18, '69.
SW. NE	"	"	"	" "	" "	40	" "
SE. NE	"	"	"	" "	" "	40	" "
SE. NW	"	"	"	" "	" "	40	Sept. 6, '70.
NE. SW	"	"	"	" "	" "	40	October 18, '69.
SE. SW	"	"	"	" "	" "	40	" "
NE. SE	"	"	"	" "	" "	40	" "
NW. SE	"	"	"	" "	" "	40	" "
SW. SE	"	"	"	" "	" "	40	" "
SE. SE	"	"	"	" "	" "	40	" "
NE. NE	31	"	"	Norman Curtis..	January 10, '74..	40	Sept. 6, '70.
SW. NE	"	"	"	"	"	40	" "
SW. NE	"	"	"	Lewis Robbins..	April 1, '74.....	40	" "
SW. NW	"	"	"	Val. Plumb.....	January 26, '74..	40.96	" "
SE. NW	"	"	"	"	"	34	" "
SW. SW	10	71	41	Chas. H. Darlin.	August 12, '73..	40	October 18, '69.
SE. SW	15	"	"	Corp. N. Mill'y..	Sept. 5, '73.....	40	January 6, '70.
NW. SE	"	"	"	"	"	40	" "
SW. SE	"	"	"	"	"	40	" "
NW. NE	28	"	"	Eaton Barnes...	March 11, '74....	40	October 18, '69.
SW. NE	"	"	"	"	"	40	" "
SE. NW	"	"	"	"	"	40	" "

EXHIBIT B—Continued.

Part of sec.	S.	T.	R.	To whom sold by R. R. Co.	Date of sale.	Acres.	Date of quit-claim Mills Co. to B. & M.
NW. SW	"	"	"	Steph. P. Davis.	Nov. 4, '74	40	June 19, '71.
SW. SW	"	"	"	"	"	40	" "
NE. SW	"	"	"	"	October 15, 74	40	" "
SE. SW	29	"	"	"	"	40	" "
NW. SE	"	"	"	"	"	40	" "
SW. SE	"	"	"	"	"	40	" "
SE. NE	32	"	"	B. W. Sherman	Nov. 4, '74	40	October 18, '69.
NE. SW	33	"	"	Warren L. Row.	October 1, '73	40	Sept. 6, '70.
SW. SW	"	"	"	W. E. Antrim.	June 21, 73	40	" "
SE. SW	"	72	"	Warren L. Row.	October 1, '73	40	October 18, '69.
NE. NE	26	"	"	Josiah Wearin.	May 5, '74	40	" "
NW. NE	"	"	"	"	"	40	" "
SW. NE	"	"	"	"	"	40	" "
SE. NE	"	"	"	"	"	40	" "
SW. NE	34	71	43	J. Buckingham.	Dec. 24, '73	40	" "
NW. NW	"	"	"	B. Buckingham.	"	40	" "
NW. SE	"	"	"	Adam Focht.	Nov. 18, '73	40	" "
SW. SE	35	"	"	R. H. Carter.	Nov. 9, '73	40	" "
SE. SW	26	72	"	Andreas Kretz.	Dec. 6, '73	40	January 6, '70.
NW. NW	29	"	"	Abr. Sherman.	October 2, '74	40	October 18, '69.
SW. NW	"	"	"	"	"	40	" "
116 NW. NW	33	72	43	H. M. Lewis.	Sept. 29, '74	40	October 18, '69.
SW. NW	"	"	"	"	"	40	" "
NW. NW	35	"	"	H. C. Watkins.	June 2, '74	40	Sept. 6, '70.
NE. SW	17	73	"	W. R. Wall.	Nov. 16, '74	40	October 18, '69.
SE. SW	"	"	"	"	"	40	" "
NW. NE	1	72	44	Bernard Glenn.	June 22, '74	31.04	Sept. 6, '70.
SW. NE	"	"	"	"	"	40	" "
SW. SE	"	71	43	R. L. Merritt.	Dec. 17, '74	40	
SW. SE	33	72	"	John Carter.	Nov. 16, '74	40	
SE. SE	"	"	"	"	"	40	

For Exhibit C see Exhibit X to the petition, pp. 21, 22, and 23 of this abstract.

EXHIBIT D.

To the board of supervisors of Mills County:

The undersigned, appointed by the board of supervisors of Mills County, Iowa, to settle, adjust, and compromise the suit in relation to swamp lands in Mills County, Iowa, wherein Mills County, Iowa, is pl'ff and The B. & M. R. R. Co. is def't, beg leave to report that in accordance with the authority and powers vested in us by your honorable body we proceeded to the city of Burlington, Iowa, and there submitted to said railroad company the proposition hereto appended, and which was on the 31st day of October, 1868, accepted by said railroad company, and which we now submit to your honorable body for approval and ratification.

Respectfully submitted November 9th, 1868.

(Signed) E. C. BOSBYSHELL.
WM. HALE.
D. H. SOLOMON.
L. W. TUBBS.

After giving the report due consideration, it is resolved by the board of supervisors of Mills County, Iowa, at their regular session in November, 1868, that the proposition submitted to the B. & M. R. R. Co. by our special railroad committee, and the acceptance of the same by the said

company, be, and the same is hereby, confirmed and ratified, and that the same be spread upon the records of this board.

The ayes and nays being called for, the vote stands as follows:

Ayes—Allis, Forrester, Haynie, Lamb, Utterback, Wing, Ward, Russell, Summers, and Mr. Chairman. Nays—none.

117 EXHIBIT E.

List of lands deeded by the B. & M. M. R. Co. to Mills County, Iowa, under the contract of settlement.

Part of section.	S.	T.	R.	To whom sold by R. R. Co.	Date of sale.	Kind of sale.	Acres.	Remarks.
NW. NW	5	72	40	Mills Co., Iowa.	October 13, 1869	Q. C.	26.92	Recorded in book 23, p. 184.
W. h. NW	17	"	"	"	"	"	80	
S. h. NE	19	"	"	"	"	"	80	
E. h. NW	1	73	"	"	"	"	75.25	
W. h. NW	3	"	"	"	"	"	75.85	
W. h. SW	"	"	"	"	"	"	80	
NE. SE	11	"	"	"	"	"	40	
S. h. SE	"	"	"	"	"	"	80	
SE. NE	15	"	"	"	"	"	40	
NW	"	"	"	"	"	"	160	
SE	"	"	"	"	"	"	160	
S. h. SE	17	"	"	"	"	"	80	
N. h. SW	21	"	"	"	"	"	80	
NW. NW	29	"	"	"	"	"	40	
SE	31	"	"	"	"	"	160	
SE. SW	"	"	"	"	"	"	40	
S. h. NE	9	71	41	"	"	"	80	
N. h. SE	"	"	"	"	"	"	86	
SW. NW	11	"	"	"	"	"	40	
W. h. SW	"	"	"	"	"	"	80	
NE	15	"	"	"	"	"	160	
E. h. SE	"	"	"	"	"	"	80	
NE. NE	17	"	"	"	"	"	40	
NE	21	"	"	"	"	"	160	
SW	"	"	"	"	"	"	160	
SE	"	"	"	"	"	"	160	
SW	27	"	"	"	"	"	160	
W. h. SW	"	"	"	"	"	"	80	

118 **EXHIBIT E—Continued.**

Part of section.	S.	T.	R.	To whom sold by R. R. Co.	Date of sale.	Kind of sale.	Acres.	Remarks.
SE. SW	27	71	41	Mills Co., Iowa.	Oct. 13, '69.	Q. C.	40	
E. h. NE	29	71	41	"	"	"	80	
E. h. NW	29	71	41	"	"	"	80	
E. h. SE	29	71	44	"	"	"	80	
W. h. NE	33	71	41	"	"	"	80	
N. h. NW	33	71	41	"	"	"	80	
W. h. SE	33	71	41	"	"	"	80	
SE. SE	1	72	41	"	"	"	40	
SE. NW	19	72	41	"	"	"	40	
SW. SE	19	72	41	"	"	"	40	
E. h. NW	23	72	41	"	"	"	80	
SW	23	72	41	"	"	"	160	
W. h. SE	23	72	41	"	"	"	80	
NE	25	72	41	"	"	"	160	
NW	25	72	41	"	"	"	160	
E. h. SW	25	72	41	"	"	"	80	
NE	27	72	41	"	"	"	160	
E. h. SE	27	72	41	"	"	"	80	
SW	29	72	41	"	"	"	160	
NW. NW	35	72	41	"	"	"	40	
W. h. NW. SW	35	72	41	"	"	"	20	
S. h. SW	35	72	41	"	"	"	80	
SE	35	72	41	"	"	"	160	
SW. SW	19	73	41	"	"	"	35.17	
S. h. NE	1	73	42	"	"	"	80	
W. h. SW	1	73	42	"	"	"	80	
N. h. SE	1	73	42	"	"	"	80	
NE	5	73	42	"	"	"	154	
E. h. SW	5	73	42	"	"	"	80	
E. h. NE	11	73	42	"	"	"	80	
E. h. SE	11	73	42	"	"	"	80	
E. h. NW	19	73	42	"	"	"	80	
SW. NE	31	73	42	"	"	"	40	
SW	3	71	43	"	"	"	160	
NE. NE	9	71	43	"	"	"	40	
SW. NW	9	71	43	"	"	"	40	
S. h. SE	9	71	43	"	"	"	80	
119 NE. NW	11	71	43	"	"	"	40	
NE. NE	19	71	43	"	"	"	40	
NW. NE	21	71	43	"	"	"	40	
NE. NW	21	71	43	"	"	"	40	
SE. NW	21	71	43	"	"	"	40	
SW. NW	27	71	43	"	"	"	40	
SW. SW	27	71	43	"	"	"	40	
E. h. NE	29	71	43	"	"	"	80	
W. h. SE	29	71	43	"	"	"	80	
N. h. NE	33	71	43	"	"	"	80	
SE. NW	33	71	43	"	"	"	40	
E. h. SW	33	71	43	"	"	"	80	
NW. SE	33	71	43	"	"	"	40	
S. h. SE	33	71	43	"	"	"	80	
W. h. NE	5	72	43	"	"	"	71.06	
NW. NE	5	72	43	"	"	"	141.85	
W. h. SW	5	72	43	"	"	"	80	
SE. SW	5	72	43	"	"	"	40	
SW. NW	7	72	43	"	"	"	41.51	
NE. SE	17	72	43	"	"	"	40	
NE. NW	19	72	43	"	"	"	40	
W. h. NW	19	72	43	"	"	"	80.31	
NE	21	72	43	"	"	"	160	
NW	21	72	43	"	"	"	160	
SW	21	72	43	"	"	"	160	
SW. SW	23	72	43	"	"	"	40	
E. h. NE	27	72	43	"	"	"	80	
SW. SW	27	72	43	"	"	"	40	
NE. SE	27	72	43	"	"	"	40	
E. h. NW	27	72	43	"	"	"	80	
E. h. SW	27	72	43	"	"	"	80	
W. h. SE	27	72	43	"	"	"	80	
SE. NE	33	72	43	"	"	"	40	
SE. NW	33	72	43	"	"	"	40	
NE. SE	33	72	43	"	"	"	40	
NE. NW	35	72	43	"	"	"	40	
S. h. NW	35	72	43	"	"	"	80	
SE	35	72	43	"	"	"	160	
SE. NE	19	73	43	"	"	"	40	
W. h. NE	31	73	43	"	"	"	80	
W. h. SE	31	73	43	"	"	"	80	
E. h. NE	1	72	44	"	"	"	71.04	

Recorded in book 23, page 184.

Recorded in book 23, page 184.

120 EXHIBIT E—Continued.

Part of section.	S.	T.	R.	To whom sold by R. R. Co.	Date of sale.	Kind of sale.	Acres.	Remarks.
W. h. NW	1	72	44	"	"	"	53.02	About.
SE. NW	1	72	44	"	"	"	40	
N. h. SW	1	72	44	"	"	"	52.60	
SW. SW	1	72	44	"	"	"	25.10	
NE. SE	1	72	44	"	"	"	40	
W. h. NE	25	72	44	"	"	"	80	
E. h. NE	13	73	44	"	"	"	80	
NE. SE	13	73	44	"	"	"	40	
E. h. NW	13	73	44	"	"	"	80	
NW. NW	13	73	44	"	"	"	40	Fr. short.
NE. SW	13	73	44	"	"	"	13.04	
W. h. SE	13	73	44	"	"	"	47.13	
NW. NE	29	73	40	"	Jan. 30, 1881..	"	40	2d deed.
SW. NW	29	73	40	"	"	"	40	Recorded book 13, at p. 304.
NE. NW	29	73	40	"	"	"	40	
NW. SW	29	73	40	"	"	"	40	
N. h. NW	31	73	40	"	"	"	74.65	
N. h. NE	9	71	41	"	"	"	80	
NW	9	71	41	"	"	"	160	
SW	9	71	41	"	"	"	160	
W. h. NE	27	71	41	"	"	"	80	
NW. SE	27	71	41	"	"	"	40	
NE. SW	27	71	41	"	"	"	40	
NW. SW	29	71	41	Mills Co., Iowa.	Jan. 30, 1871..	Q. C.	40	
SE. NW	33	71	41	"	"	"	40	
NE. SW	35	72	41	"	"	"	45	
E. h. NW. SW	35	72	41	"	"	"	20	
NE	35	72	41	"	"	"	160	
N. h. NE	25	73	42	"	"	"	80	
NW. SE	31	73	42	"	"	"	40	
N. h. SW	9	71	43	"	"	"	80	
SE. NW	9	71	43	"	"	"	40	
NW. NW	11	71	43	"	"	"	40	
W. h. NW	17	71	43	"	"	"	80	
W. h. NE	29	71	43	"	"	"	80	
S. h. NE	33	71	43	"	"	"	80	
NE. SE	33	71	43	"	"	"	40	
SE	21	72	43	"	"	"	160	
SW. NE	27	72	43	"	"	"	40	
NW	27	72	43	"	"	"	160	
E. h. SW	27	72	43	"	"	"	80	
NW. SE	27	72	43	"	"	"	40	
E. h. SE	27	72	43	"	"	"	80	
SW. SE	1	72	44	"	"	"	40	
SE SW	1	72	44	"	"	"	40	
NE. SW	13	72	44	"	"	"	40	
NE. SW	25	72	44	"	"	"	40	
NW. SE	25	72	44	"	"	"	40	
Lot No. 1	27	73	44	"	"	"	12.60	
SW. NW	35	73	44	"	"	"	11.10	
SW	15	73	40	"	"	"	160	
NW	21	73	40	"	"	"	160	

Recorded in book 13, page 304.

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EXHIBIT F.

Swamp selections by Mills County to the B. & M. Railroad returned from tax sale by the B. & M.

Parts of section.	S.	T.	R.	Date of sale for taxes.	Years sold.	Date of redemption.	Am't paid for redemption.
SW. NE	15	72	40	Dec. 14, '66...	'60 to '62	Dec. 10, '66	$18 52
NE. NE	7	"	"	"	'59 to '62	"	18 52
NW. SE	17	73	"	Dec. 14, '63 ...	"	"	18 50
NE. SE	23	72	41	"	'60 to '62	Dec. 12, '66	13 11
NW. SW	17	"	43	"	'58 to '62	" 6,	22 62
SW. SW	"	"	"	"	"	"	22 62
NW. SW	20	"	"	"	'57 to '62	"	33 16
SW. SW	"	"	"	"	"	"	33 16
NE. NE	31	"	"	October 3, '64	'58 to '63	October 2, '67...	37 71
SE. NE	"	"	"	"	"	"	37 71
NE. SE	"	"	"	"	"	"	37 71
SE. SE	"	"	"	"	"	"	37 71
NE. NW	17	73	"	Dec. 14, '63	'58 & '60 to '62.	Dec. 10, '66.....	30 33
SE. NW	"	"	"	"	"	"	22 56
NE. SW	"	"	"	"	'59 to '62	"	25 03
SE. SW	"	"	"	"	"	"	25 04
							$400 34

EXHIBIT G.

This indenture of lease and agreement, concluded this 31st day of December, A. D. one thousand eight hundred and seventy-two (1872), by and between the B. & M. R. R. Co., a corporation organized under the laws of the State of Iowa, of the first part, and the C., B. & Q. R. R. Co., a corporation created and organized by and under the laws of the State of Illinois, of the second part:

Whereas the C., B. & Q. R. R. Co. is the owner of and maintains and operates a main line of railroad extending from Chicago to Burlington, and is also the owner of various other lines of railroad, both main and branch, situated in the States of Illinois and Iowa, with their appurtenances, and the B. & M. R. R. Co. is the owner of a main line of railroad extending from the city of Burlington to a point on the Kansas City, St. Joseph and Council Bluffs Railroad, about fifteen miles from Council Bluffs, Iowa, and in virtue of a leasehold from that company runs its trains over that road into Council Bluffs, and is also the owner or
122 lessee of certain branch railroads connecting with its main line, which it maintains and operates, with their appurtenances, all situated in the State of Iowa; and

Whereas said main lines of railroad of said companies as now constructed and operated, constitute one continuous line of railroad from Chicago, by way of Burlington, to Plattsmouth and Council Bluffs, on the Missouri River, and it is believed to be for the mutual interest of the two companies that the same should be owned, maintained, and operated by a single corporation, and that to secure this end, the stock, property, rights, privileges, and franchises of the one should be managed and controlled by the other; and

Whereas, with this view, meetings of the respective boards of directors of said corporations were duly called and held on the third day of Oc-

tober, A. D. eighteen hundred and seventy-two (1872), at which the lease and agreements herein contained were considered and agreed upon, subject to ratification by the stockholders of said companies, respectively, and as a part of such agreement, it was arranged that the share values of the respective stocks should be equalized by the distribution, by the said second party, of twenty-five per cent. on the capital stock, in the seven per cent. bonds of this company to its stockholders, and afterwards, at meetings of stockholders of said respective corporations, duly called and held for that purpose, the terms of said lease and agreements were approved and ratified, and the execution of this instrument recommended, and at previous meetings of said respective boards of directors, the presidents and secretaries of said companies were directed to execute this agreement and carry the same into effect, provided the same should be ratified by the stockholders, as aforesaid:

Now, therefore, this instrument witnesseth that the party of the first part, to accomplish the objects aforesaid, and in consideration of the stipulations and agreements herein contained, to be kept and performed by said second party, has granted, demised, and leased, and does hereby grant, demise, and lease, in perpetuity, to the said party of the second part, its successors and assigns forever, all and singular, its railroad, situated in the State of Iowa, extending from Burlington, on the Mississippi River, to Plattsmouth, on the Missouri River, constructed and to be constructed, and all branches connected therewith, owned or controlled by it, all rights of way, depot and other lands or interests therein, connected with said railroad or branches, all station-houses, shops, offices and other build-
123 ings and structures of whatsoever kind, belonging thereto, or used in connection therewith, together with all fixtures and appurtenances belonging to said railroad, branches, or other property, or in any manner connected therewith; all the equipment of said railroad and branches, including engines, cars, and all other rolling-stock, and all tools, machinery, materials, and every other matter or thing connected with the equipment of said railroad or branches; all rights, privileges and franchises of said party of the first part in and to the aforesaid railroad, branches, or other property now held, used, or controlled by it, or which it may hereafter acquire or become entitled to, together with all other property of every kind and description belonging to or appurtenant to said railroad, branches, and to other property, and its right, title, and interest in and to the same, and to every part thereof.

And the said party of the first part, also, for the aforesaid considerations, hereby grants, bargains, sells, assigns and transfers to said second party, its successors and assigns, all the lands heretofore granted to it by the general government, now remaining unsold, and amounting to about two hundred thousand acres, more or less, and all other, the lands and real estate of said first party owned or possessed by it, or to which it may be or become entitled, and all title and interest it may have therein; all contracts, evidences of indebtedness, received or held for land herefore sold by said party of the first part; also all moneys, notes, accounts, evidences of debt, choses in action, and all other the personal property of said first party, of whatsoever kind, and wheresoever situated. Also, all leases of branch roads or connecting roads, or any part thereof, now held and possessed by said party of the first part

To have and to hold the said leasehold premises, railroad branches, rights, privileges, and franchises, in perpetuity, as aforesaid, and said lands and interests in real estate, leases, moneys, contracts, evidences of debt, choses in action, and other property above mentioned, or intended to be conveyed hereby to said party of the second part, its successors and assigns, forever; as fully, in all respects, as said party of the first part might have held, used, controlled, or enjoyed, the same had this instrument not been made, with full power and authority to collect, receive, have, and use all the rents, proceeds, profits, and income thereof, and all moneys and revenues to be derived therefrom, and appropriate the samein such manner as it or they may deem best, and as shall be consistent with the interests hereof, with full authority to the said second party in the
124 management and disposition of the railroad and property herein mentioned, to use the name and seal of said first party as full in all respects as it could do had this instrument not been made.

And the said first party also agrees to keep up its corporate organization until the complete and absolute union and consolidation of the stock and properties of the two companies, as contemplated by the parties, shall be effected, the cost of the maintenance of such organization, however, to be paid by the second party.

The said party of the second part, in consideration of the premises, does hereby covenant and agree with the said party of the first part, its successors, and assigns, to take immediate possession of said demised railroad and other property herein granted, and to keep said railroad and branches equipped, and maintain and operate the same in such manner as to furnish reasonable accommodations to the public; to pay or cause to be paid all taxes or assessments that may be lawfully levied, charged, or assessed on said railroad and property, or any part thereof; to assume all leases, contracts, bonds, and other obligations of whatsoever kind; to pay and discharge all debts and liabilities of every nature, both principal and interest, of said party of the first part as they shall severally mature; to make to the stockholders of said party of the first part, and to the stockholders of its respective branches, the same and same amount of dividends per share that it shall make to its own stockholders, and also to grant and secure to them, respectively, the same benefits and emoluments of every description that its own stockholders may receive, have, or become entitled to.

Provided, however, that the holder of any of the convertible bonds of said first party, who may elect to convert the same, and thus become a party to this arrangement, shall receive by way of dividend on the stock obtained by such conversion only such pro rata proportion of any dividend declared next after such conversion as the interval between the date of such conversion and the date of the payment of such dividend bears to the interval between the last dividend of said corporation, and the one in which the party so converting may be entitled to participate, and the certificate of stock to be issued on such conversion shall be qualified accordingly.

It is hereby mutually agreed by and between the parties hereto to execute and deliver such further conveyances, papers, and authority as counsel shall deem necessary to more completely effect the objects sought, and to carry out the intention of the parties to this instrument.

125 In witness whereof the parties hereto have caused this instrument to be signed by their respective presidents, and their respect-

ive seals to be hereto attached, and attested by their secretaries, the day and year first above written.

BURLINGTON AND MISSOURI RIVER RAILROAD COMPANY,
{ BURLINGTON AND MISSOURI R. R. CO. SEAL. } (Signed) By J. W. BROOKS, *President.*
Attest:
J. N. DENISON, *Ass't Sec'y.*

CHICAGO, BURLINGTON AND QUINCY RAILROAD COMPANY,
{ CHICAGO, BURLINGTON AND QUINCY RAILROAD CO. } (Signed) By J. M. WALKER, *President.*
Attest:
A. T. HALL, *Secretary.*
(Duly acknowledged.)

On the 13th of April, 1875, def'ts, by Hale & Stone, attorneys, filed the following answer of Brooks, Hardy, and Griswold (p. 170 of transcript):

1st. That on December 13, 1874, and for many years prior thereto, the def'ts, Brooks and Hardy, were citizens of the State of Massachusetts, and the def't Griswold was a citizen of the State of Rhode Island, and said def'ts have been citizens of said States, respectively, ever since said date; that at said time the pl'ff was and has ever since continued to be a citizen of Iowa.

2d. That on the said 13th day of December, 1874, these def'ts filed their bill in equity in the circuit court of the United States for the district of Iowa, at Des Moines, in a cause wherein these def'ts are complainants, and the said Mills County, Iowa, is def't.

3d. That at the time of the institution of and process of service in the last-mentioned suit in said circuit court, this court had no jurisdiction of the persons of these def'ts, for the reason that there was no service upon them, either by personal service or by publication, and they had not voluntarily appeared herein.

126 4th. That on December 14th, 1874, proper process by a subpœna in chancery issued out of the office of the clerk of the circuit court of the United States for the district of Iowa, was duly served according to law and the practice of the federal courts on the pl'ff above named, of the pendency of said cause in said federal court, commanding the said pl'ff herein to appear and plead to said bill by Monday, February 1, 1875.

5th. That service on these def'ts in this cause was not completed until the 28th of January, 1875.

6th. That the pl'ff has appeared in obedience to said subpœna and pleaded to said bill.

7th. That in said bill the def'ts have asserted their rights in the matters in controversy. That this court ought not to take cognizance of said matters for the reason that no allegations are contained in the petition herein putting in or presenting an issue as to these def'ts; that the rights, claims, interests, and obligations of these def'ts are not set up or shown by said petition, and as to them this court has acquired no jurisdiction of the subject-matter.

8th. That proper process was had in said cause in the said circuit court

to bring the pl'ff into court therein before the completion of service on these def'ts in the cause in this court and said circuit court is still pending and undetermined. Therefore these def'ts pray that the court dismiss the petition herein and the amendments thereto as to these def'ts, and that a decree be entered that this court has no jurisdiction of the persons of these def'ts or of the subject-matter of any suit as to them.

(Answer duly verified.)

On the 26th of August, 1875, John Evans, jr., one of def'ts herein, claiming the E. ½ of sec. 18, T. 72, R. 40 W., filed petition, asking to be allowed to intervene (pp. 184 and 238 of Transcript); and on Sept. 6, 1875, said Evans filed petition and bond, praying for the removal of said cause, so far as same related to himself and said tract, to U. S.
127 circuit court, which petition was granted, and cause removed as prayed for (pp. 216, 227, and 238 of Transcript).

On the 17th of Sept., 1875, def'ts Brooks, Hardy, and Griswold, by Hale & Stone, attorneys, filed the following amendment to their answer herein (p. 232 of Transcript); that in said proceedings in the circuit of the U. S. the said def'ts Brooks, Hardy, and Griswold are complainants and said Mills County, Iowa, is respondent.

2d. That the subject-matter of that controversy is the same as these def'ts would set up in this answer as to their rights in the matters in controversy.

3d. The relief sought in that proceeding is the same as that which they would seek in this case, if they should be compelled to show their rights herein.

On Dec. 23, 1875, def't Giles Hinson, by Hale & Stone, attorneys, filed answer, in substance, as follows (p. 241 of Transcript):

That he owns by purchase from the B. & M. R. R. Co. the W. ½ of S. W. ¼ of 29, 72, 43; that the same has been enclosed since March, 1873; that sixty-five acres are under cultivation; that said improvements were made in good faith, and that he purchased and improved the same without any knowledge of pl'ff's claim. He denies the allegation in pl'ff's bill, and asks that the answer of the C., B. & Q. be taken as his answer.

He alleges that Mills County, by its proper officers, placed upon the tax books of said county the land above described as the property of this def't; that he has paid to the treasurer of Mills County taxes for the years 1873 and 1874, and received from said treasurer receipts therefor, and that by these acts said county is estopped from claiming title to the same; and prays for a decree quieting the title in him.

(Duly verified.)

On December 23, 1875, Thomas Crewdson, by Hale & Stone, attorneys, filed answer in substance as follows (p. 246 of Transcript):
128 That on the 11th of December, 1865, the B. & M. R. R. Co. conveyed to him by warrantee deed the NE. SE. of 5, 71, 43; that he has paid taxes thereon for the years 1866 to 1873, inclusive, and thereby pl'ff is estopped from making any claim of title. That in February, 1874, he conveyed by warrantee deed the said land to B. Gunsolly. That he, his grantor, and grantee have occupied the land for 20 years. He asks

that the answer of the C., B. & Q. R. R. Co. be taken as his answer, and the prayer thereof his prayer.

(Duly verified.)

On December 23, 1875, def't Daniel Cavenaugh, by Hale & Stone, attorneys, filed answer substantially as follows (p. 251 of Transcript):

That he purchased of the B. & M. R. R. Co. the NW. NW. of 13, 73, 42, and has occupied said land since June, 1871. That the whole tract is enclosed, and one-half in cultivation; that he purchased and improved the same without any knowledge of the pl'ff's claim; and he denies the allegations of pl'ff's bill, and alleges that he paid the taxes thereon in the name of his grantor for the year 1871, and for the years 1872, 1873, and 1874 in his own name, and received receipts in due form, except for the year 1874, upon which receipt the treasurer wrote the words, "Received under protest," and that thereby pl'ff is estopped. He prays that the answer of the C., B. & Q. R. R. Co. herein may be taken as his answer, and the prayer thereof his prayer.

(Duly verified.)

On the 1st of January, 1876, pl'ff filed the following reply to the answer of the C., B. & Q. R. R. Co. (p. 262 of Transcript):

1st. Pl'ff denies the averments in the 2d par.

2d. Pl'ff has not knowledge or information sufficient to form a belief as to any of the matters averred in the 3d and 4th paragraphs of said answer.

3d. Pl'ff denies the averments in the 5th par. of said answer.

129 4th. Pl'ff admits the averments in the 6th and 7th paragraphs of said answer.

5th. Pl'ff admits the averments in the 8th par., except as to the number of acres sold, and as to the actual number pl'ff has not sufficient knowledge thereof to form a belief.

6th. Pl'ff denies the averments in the 9th par., except this, that the pl'ff admits the appointment by its board of supervisors of Wm. Hale, E. C. Bosbyshell, L. W. Tubbs, D. H. Solomon, and S. Christy as a committee to confer and treat with the B. & M. R. R. Co., with a view of settling the points in controversy.

7th. Pl'ff denies the averments in the 10th to the 14th paragraph, inclusive, in said answer, except the following: Pl'ff admits that on or about July 13, 1868, the said committee submitted to the B. & M. R. R. Co. the proposition set out in Exhibit C to said answer (see Exhibit X, p. 21 this abstract), and that on or about October 27, 1868, said railroad company accepted said proposition, and that about the of November the pl'ff, by its board of supervisors, approved of said proposition as set forth in the resolution embodied in Exhibit D to said answer; and pl'ff denies that said proposition so made and accepted was of any force in that form and condition, because the question involved therein had not been submitted to an election of the people of the county, and was not authorized by a majority vote as required by law; and, further, because said proposition is based upon two considerations, one of which is illegal, and therefore the same was and is null and void.

8th. Pl'ff admits the appointment of Wm. Hale and H. C. Watkins as

special agents for Mills County, to adjust all land claims according to the terms of said proposition, and pl'ff denies every other matter contained in the 15th par. of said answer.

9th. Pl'ff has not sufficient information to form a belief as to the averments in the 16th par., but pl'ff says that if said Copeland was so
130 appointed such appointment was without her consent, and that at, and long after, the time of his supposed appointment he was clerk of the board of supervisors, and so sustained confidential relations to pl'ff that rendered his appointment and acts upon said committee fraudulent.

10th. As to the averments in the 17th and 18th paragraphs, pl'ff has not sufficient knowledge or information to form a belief.

11th. Pl'ff denies the averments contained in the 19th par.; denies that the alleged deeds are her acts; denies that the persons signing said deeds did so under any authority, or in pursuance of any warrant of law, and denies that said deeds passed title to any of the lands in controversy.

12th. Pl'ff denies that she conveyed any of the lands in controversy to the B. & M. R. R. Co.; denies that she assessed and levied taxes on said lands, as owned by said railroad company, for the years 1870 to 1874, inclusive. Plaintiff avers that if any of said lands appear on the tax books as owned by said railroad company, then that the same was unauthorized and is not the act of this pl'ff; and further, that if any tax receipts have been issued to said railroad company, then that the same were unauthorized. Pl'ff denies that it has ever, in any manner, recognized said railroad company as the owner of said lands. Pl'ff further avers that the lands in controversy were of the class of lands granted to the State of Iowa, under act of Congress, approved Sept. 28, 1850, entitled "An act to enable the State of Arkansas and other States to reclaim the swamp lands within their limits." That at the times indicated in the 20th par. of said answer said lands were trust property, and so owned and held by this pl'ff under said act of Congress and of the general assembly of the State of Iowa, approved Jan. 13, 1853, entitled "An act to dispose of the swamp and overflowed lands in the State of Iowa, and to pay the expenses of selecting and surveying the same," and of other acts of said general assembly supplemental thereto; and of the certain other act of Congress, approved March 3d, 1857, entitled "An act to confirm to the several States the swamp and overflowed lands selected under the act of Sept.
131 28th, 1850, and of the act of the 2d of March, 1849;" and further, that said lands were not then, by reason of said proposition, of which Exhibit C to said answer is a copy (see p. 21, this abstract), or by reason of the alleged deeds, of which Exhibits C, D, E, F, and G to the petition herein are copies, subject to taxation; and further, pl'ff avers that it has always, from the time said lands were granted under said act of the general assembly, approved Jan. 13, 1853, in trust as therein provided, asserted title thereto adversely to all other persons, and especially to the pretended claim of said B. & M. R. R. Co. Pl'ff further avers that if any of said lands appear on the tax books as owned by said B. & M. R. R. Co., then that the same appear thereon by mistake, or by the procurement of said railroad company. Wherefore and because of the matters aforesaid, pl'ff says that she is not estopped from pursuing said lands as trust property, by setting up and claiming title thereto as against said rail-

road company; and further, pl'ff denies every other matter and thing in said 20th par. contained, not herein otherwise answered.

13th. Pl'ff says that all of the averments contained in the 23d par. which are in any manner inconsistent with or contradictory to the averments of the petition herein, are wholly untrue; and, further, pl'ff avers that the property which was the subject of the alleged compromise and settlement, was trust property, and before a court of chancery, and a decree had been made and rendered prior to the date of such compromise and settlement, and that said compromise and settlement was so made without the consent of said court, and so pl'ff says that the said alleged compromise and settlement and all acts done and performed in pursuance thereof were and are nugatory and void.

14th. Pl'ff avers that said B. & M. R. R. Co. never had any title in the lands referred to in the 24th par. of said answer; and further, that the grantees of the deeds referred to in said paragraph had notice that their said grantor had no title in said lands at and before taking said conveyance. Pl'ff denies that said lands became taxable, or ever were in fact taxed by reason of the matters alleged in said paragraph; and
132 denies any other matter and thing in said paragraph inconsistent with the averments of the petition herein and not herein otherwise answered.

15th. Pl'ff denies that the instruments referred to in the 25th par. of said answer and annexed thereto as Exhibit G, is a deed in fact or in law, and denies that the parties thereto ever treated it as a deed, and aver that long prior to the date of said instrument the parties thereto, and especially said C. B. & Q. R. R. Co., had notice that said B. M. & R. R. Co. had no valid claim to the lands in controversy, and that the deeds upon which said last named company founded its claim of title are not the deeds of Mills County, and that the persons signing said deeds had no authority in fact or in law so to do, and that said deeds were procured by said B. & M. R. R. Co. without any warrant or authority of law, and that the lands in said pretended deeds described were trust lands; and that the conveyances attempted by said deeds were in violation of law and in fraud of said trust; and pl'ff denies any other matter and thing in said paragraph contained not herein above answered.

16th. Pl'ff avers that the act of Congress referred to in paragraph, 26th and 27th of said answer contemplated that the route of said road should be definately fixed by said railroad company before the grant could pass and vest title in the State in aid of such railroad, and further, that said act inhibited the location of the lands so given in aid of the road in one place and the location of the route and the construction of the road in another place, and that as a matter of fact said B. & M. R. R. Co., in compliance with said act of Congress, and of the requirements of the Land Department of the United States, by map and certificate, dated March 24th, 1857, and filed in the office of the secretary of state of the State of Iowa, March 28, 1857, definately fixed the routes of said road through Mills County via Glenwood, and so pl'ff says that said B. & M. R. R. Co. became and was obliged to adhere to said route and to construct its road thereon, and as to all other matters and things contained in said 26th and 27th paragraphs pl'ff says the same are wholly untrue

133 17th. Pl'ff avers that the allegations in the 28th par. of said an-

swer relating to the certification of lands by the Commissioner of the General Land Office to said B. & M. R. R. Co. ought not to be regarded by the court in this action, for the reason that by the decree to the action herein referred to said certificate was declared a nu'lity and was already set aside, which said decree has never been abated, reversed, or set aside, wherefore pl'ff says that said allegations and said certificate are res adjudicata, and this court cannot now entertain the same, and as to all other averments in said par. contained which are in any manner inconsistent with or contradictory of the petition herein, pl'ff says that the same are wholly untrue.

18th. Pl'ff for reply to all the matters contained in the 29th par. of said answer, which are not embraced in the motion to strike, this day filed, and which are in any manner inconsistent with or contradictory of the averments of the petition herein, says that the same are wholly untrue.

19th. Pl'ff for reply to all other matters and things set forth in said answer which are not embraced in the motion this day filed, and which are inconsistent with or contradictory of the petition herein, says that the same are wholly untrue, and pl'ff here reaffirms all the matters and things averred in said petition, and prays judgment and decree as therein prayed for.

(Duly verified.)

On the 1st of January, 1876, pl'ff filed the following reply to the answer of the B. & M. R. R. (p. 277 of transcript).

That as to the matters averred in said answer it has not knowledge or information sufficient to form a belief, and therefore neither admit' or denies the same; and pl'ff here reaffirms all the allegations of her petition, and prays judgment and decree as therein prayed for.

(Duly verified.)

On the 7th of February, 1876, def't, C. B. &. Q. R. R. Co., by Hale, Stone & Proudfit, attorneys, filed amendment to answer, and states (p. 336 of transcript):

134 That it is the owner of the land described in Exhibit M to the deposition of C. W. Spalding filed herein January 5, 1876, by further claim, to wit, tax deeds made by the treasurer of Mills County, certified copies of which are hereto attached and made part of this answer, which deeds are held in trust for this def't, and def't claims title by virtue of said deeds, and that pl'ff is estopped thereby from claiming said lands, and def'ts pray decree quieting title in itself to said lands and for costs.

DEED No. 1.

Tax deed by W. H. Taft, treasurer, to J. N. Dennison, dated April 20th, 1869, conveying NE. NW. 1, 72, 44; NW. NW. and SW. NW. 29, 72, 43, on sale made October 3, 1864, for taxes of 1859 to 1863, inclusive.

DEED No. 2.

W. H. Taft, treasurer, to J. N. Dennison, dated April 14th, 1869, conveying SE. NW. and W. ½ SE. 1, 71, 43; NE. NE. 1, 73, 42; NE. SW. 7, 72, 40; SW. SW. 5, 72, 40; NW. SW. 33, 71, 41; SW. NE.

33, 72, 43; W. ½ NW. 5, and S. ½ SW. and SW. SE. 17, 71, 43, on sale made October 1st, 1864, for taxes of 1860 to 1863, inclusive.

DEED NO. 3.

W. H. Taft, treasurer, to J. N. Dennison, dated April 20th, 1869, conveying E. ½ NW. 5, and NW. SW. 17, 71, 43; NW. SE. 1, and SE. SE. 1, 72, 44, on sale made October 3d, 1864, for taxes of 1858 to 1863, inclusive.

DEED NO. 4.

W. H. Taft, treasurer, to J. N. Dennison, dated April 20th, 1869, conveying NE. SW. 31, 73, 40; SE. SE. 19, 73, 43; NE. NW., SE. SW., NW. SW., W. ½ SE. 15, 71, 41; N. ½ NW. 33, 72, 43; SW. NE. 13, 72, 44, on sale made October 3d, 1864, for taxes of 1859 to 1863, inclusive.

135 DEED NO. 5.

W. H. Taft, treasurer, to J. N. Dennison, dated Oct. 20th, 1869, conveying SE. NE., E. ½ SE. 29, NW. NE., SW. NW. 33, NW. NE. 27, 72, 43, on sale made October 3d, 1864, for taxes of 1858 to 1863, inclusive.

And on the 7th of February, 1876, def't H. B. Jones, by Hale & Stone, attorneys, filed answer in substance as follows (transcript, p. 367):

That he is the owner of SW. NE. 9, 71, 41; that the taxes have been paid upon said land for the years 1867 to 1874 inclusive, and receipts given by the treasurer; that neither the B. & M. R. R. Co. or the C., B. & Q. R. R. Co. claims any portion of said land; that the B. & M. R. R. Co. conveyed the lands to Mills County, Oct. 13th, 1869, in pursuance of settlement; that he holds title from Mills County for said land and has been recognized by said county as the owner of said lands, and prays for judgment and decree, with costs.

(Duly verified.)

On Feb. 8th, 1876, def't Peter Eckley, by Hale & Stone, attorneys, filed answer in substance as follows (p. 378 of transcript):

That he is the owner of the SE. ¼ of 4 and the W. ½ NE. 9, 73, 40 by purchase from the B. & M. R. R. Co. without knowledge of pl'ff's claim, and that he has made valuable improvements thereon; that pl'ff has collected taxes thereon from said def't and his grantors, and is thereby estopped, and prays for a decree quieting title in def't and for costs.

And on the same day def't W. H. Eckley, by Hale, Stone & Proudfit attorneys, filed answer substantially as follows (transcript, p. 383):

That he is the owner by purchase from the def't, the B. & M. R. R. Co., of the E. ½ NE. 4, 73, 40; that said purchase was made without knowledge of pl'ff's claim; that he has made valuable improvements thereon; that he has paid taxes for the years 1872, 1873 and

136 1874, and that pl'ff is thereby estopped. He denies the allegations in the petition not admitted in the foregoing, and asks for a decree quieting title in him and for costs.

And on the same day def't George S. Wilson, by Hale & Stone, attorneys, filed answer substantially as follows (Transcript, 387):

That he is the owner of the in controversy, and that the greater portion of the same is under cultivation; that he has paid the taxes for 1871, 1872, and 1873. He denies the allegations of pl'ff's petition inconsistent with this answer, and asks that the answer of the C., B. & Q. R. R. Co. may be taken as his further defence.

On the 7th of February, 1876, default was entered against the following parties, defendant, for want of answer (transcript, p. 393): Thomas Conner, W. L. Roll, J. O. Munsen, S. D. Davies, Wm. Elias, and John Antrim, H. W. Summers, E. Barnes, S. T. Brothers, Frank Hobbs, C. H. Darling, J. S. Wright, J. Buckingham, E. Sheeks, J. Van Eaton, E. Delashmut, Wm. E. Dean, J. Smith, John Haney, George Morrow, H. Fisher, F. M. Thomas, David Henderson, Samuel Purcell, J. S. Runkles, J. T. Hamilton, J. F. Henderson, and Samuel Masters.

And on Feb. 10 (Transcript, p. 395) against the following parties defendant: T. A. Wright, D. H. Epperson, and F. M. Buffington.

On the 15th of February, 1876, def't Otis E. Allis, by Kelly Bros., attorneys, filed answer, substantially as follows (Transcript, p. 396):

That he is the owner, by purchase from def't B. & M. R. R. Co., and without knowledge of pl'ff's claim, of the NW. ¼ 17, 73, 43, and that he has made valuable improvements upon the same; that taxes have been paid upon said land for the years 1871 to 1874, inclusive, and that pl'ff is thereby estopped. He denies the allegations of pl'ff's petition not admitted in the foregoing, and prays a decree quieting title in him.

(Duly verified.)

137 On the 9th of February, 1876, Abraham Sherman, def't, filed petition as intervenor (Transcript, p. 409), stating that on Oct. 2d, 1874, he purchased the W. ½ NW. ¼ 29, 72, 43, for $1,200, and has paid $144 thereon, and agreed to pay the balance in annual installments, commencing Oct. 2d, 1876, and running to Oct. 2d, 1884, and praying that he may be allowed to keep the land on just and equitable terms.

(Duly verified.)

On the 23d of Febru'ry, 1876, def't John A. Boswell filed his intervention (Transcript, p. 412), stating that he is the equitable owner of W. ½ SW. ¼ of 14, 73, 40, by virtue of a pre-emption certificate issued by Mills County, and by virtue of a contract of purchase of same land from B. & M. R. R. Co. for a consideration of $1,360, on which there is still due about $800; and praying that he may be allowed to keep and retain the land, and for general relief.

(Duly verified.)

And on the same day def't Josiah Wearin filed his intervention (Transcript, p. 447), stating that he is the owner by contract from B. & M. R. R.

Co., dated Dec. 16, 1874, of N. ½ SE. ¼ and SW. SE. 26, 72, 41, in consideration of $1,344, of which all but $492 has been paid; and praying that he may be allowed to keep and retain the land, and for general relief.
(Duly verified.)

And on same day said Wearin filed his other petition as intervenor (Transcript, p. 421), stating that he is the equitable owner of the NE. ¼ 26, 72, 41, by virtue of a pre-emption certificate issued by Mills County, and by contract from the B. & M. R. R. Co., dated May 5, 1874, for a consideration of $2,048, of which he has paid all but about $750; and further stating that he has had possession of said lands for many years, and has improved the same, and that the B. & M. Co. induced him to make said contract by fraudulent representations; and praying that he may be allowed to keep the land upon just and equitable terms, and for general relief.
(Duly verified.)

138 On the 23d of February, 1876, def't Lewis Robbins filed his intervention (transcript, p. 425), stating that he is owner by purchase from B. & M. R. R. Co., dated April 1, 1874, the SW. NE. 31, 73, 40, for a consideration of $440, upon which he has paid $52.80, and is to pay the balance in annual installments upon April 1st, 1876, to 1884, inclusive, and prays to have his rights protected, that he may keep the land, and for general relief.

On the 16th of February, 1876, def't Bernard Glenn filed his intervention (transcript, p. 432), stating that he is the owner, by contract from B. & M. R. R. Co., dated 22d June, 1874, of the W. ½ NE. 1, 72, 44, for a consideration of $497.28, of which he has paid $59.68, and has agreed to pay the balance in annual installments, commencing June 1st, 1876, and ending June 1st, 1884, and praying that he may be allowed to keep the land, and for general relief.
(Duly verified.)

On the 23d February, 1876, def't Andreas Kretz filed his intervention (transcript, p. 435), stating that he is the owner, by contract from the B. & M. R. R. Co., dated Dec. 6th, 1873, of the SE. SW. 26, 72, 43, for a consideration of $680, upon which he has paid $40.80, and agreed to pay the balance in annual installments, commencing Dec. 6th, 1874, and running to Dec. 6th, 1883, and he prays that his rights may be protected, and for general relief.

On the 17th of February, 1876, pl'ff, by Solomon, Lawrence and Ross, filed reply to paragraphs 21 and 22 of separate answer of C., B. & Q. R. R. Co., and says (transcript, p. 437):
Pl'ff denies all the averment contained in said paragraphs; denies that the alleged assessments, levies, sale, and redemptions were or are its acts, denies that the persons making such assessments, levies, and sales, and signing said certificates of redemption, did so by the authority or with its knowledge or approval, and denies that any of said acts were done under and in pursuance of any warrant or authority of law, and denies that by reason of any of said acts said def't acquired any right to or in-

139 terest in the subject of this controversy, and denies that it is estopped by reason of the matters contained in said paragraphs.

On the 21st of February, 1876, pl'ff filed the following reply to the answer of Brooks et al. (p. 451 of transcript):

1st. Pl'ff admits that she is a citizen of Iowa, and as to all other matters in 1st par. contained pl'ff has not sufficient knowledge or information to form a belief.

2d. Pl'ff denies that the parties to said suit in the circuit court of the United States are the same as the parties to this action.

3d. Pl'ff avers said Griswold, with Forbes and Kidder, were made parties to the original petition herein, and as to them this action was commenced on the 29th of January, 1874, and long prior to the commencement of said suit in the circuit court of the United States. And pl'ff further avers that said Brooks, Hardy, and Griswold appeared in this action Feb. 16th, 1875, and filed their general demurrer to the petition, which demurrer was afterwards, on Feb. 26th, 1875, overruled by the court.

4th. Pl'ff further avers that whilst the parties, subject-matter, and object of this petition, are as in the petition herein set forth, that the parties to said suit in the circuit court of the United States are said Brooks, Hardy, and Griswold, as sole pl'ffs, and Mills County, Iowa, as sole def't, and the subject matter of said suit is an alleged security claimed by said Brooks et al. in the lands in their bills mentioned under and by virtue of a mortgage given by the B. & M. R. R. Co., and the object of said suit is to quiet the title of said mortgagor in said lands, said mortgagor not being a party to, or asking any relief in, said suit.

Pl'ff denies every other matter and thing in said answer contained in any manner inconsistent with or contradictory of the matters contained in this reply, wherefore pl'ff asks judgment and decree as in its petition prayed.

140 On the 23d of February, 1876, the pl'ff filed replies to the separate answers of Peter Eckley, Dennis Sheedy, Fred. Schoenig, Giles Hinson, Daniel Cavenaugh, L. Hinson, S. B. Sidner, O. E. Allis, W. H. Eckley, Thos. Crewdson, H. B. Jones, T. S. Goddard, J. V. Hinchman, Geo. S. Wilson (transcript, p. 461), substantially as follows:

That as to the matters and things stated in said answers, pl'ff has not sufficient knowledge or information to enable her to form a belief.

Pl'ff denies that Mills County has collected taxes on said lands, as stated in said separate answers, and if said taxes were so collected that the same was done through mistake, and is not the act of Mills County, and that said county is not estopped thereby, and that the officers who collected the same had no authority to do any act which would forfeit the title of the county to its property.

(Replies duly verified.)

On the 25th of February, 1876, def't, C., B. & Q. R. R. Co., by Hale, Stone & Proudfit, attorneys, filed amendment to answer, as follows (transcript, p. 480):

1st. Def'ts deny that it is indebted to pl'ff in the sum of $5,000, or any other sum.

2d. Def't says that the amounts of money sought to be recovered by

pl'ff were received by def't in pursuance with the terms of the contract of settlement made between the said B. & M. R. R. Co. and pl'ff, a copy of which contract is attached to this answer (see p. 21 this abstract for copy of contract). That by the express terms of said contract the said B. & M. R. R. Co. was entitled to receive balance due of $1.25 per acre from the parties holding land under pre-emptions included among the lands then in dispute between said company and pl'ff, and that said company under said contract received said sums, and made to the parties paying the same conveyances of the lands so pre-empted and held by settlers of said county,
in pursuance with the terms of said contract, and in adjustment of
141 the matters growing out of said contract. Copies of said deeds
hereto attached. That the money so received by the B. & M. R. R. Co. was not in trust, but by express terms of said contract the property of said company. Therefore def't prays judgment for costs.

Exhibits to foregoing answer.

DEED NO. 1.

Know all men by these presents, that the B. & M. R. R. Co., for the consideration of one hundred dollars, to be paid by H. C. Watkins, of Mills County, in the State of Iowa, the receipt of which is hereby acknowledged, doth hereby grant, bargain, and sell unto the said H. C. Watkins the following described real estate, lying and being in the county of Mills, State of Iowa, to wit: The E. ½ of SW. ¼, sec. 1, T. 73, R. 42, situated in Mills County, and State of Iowa, containing, according to the United States survey, eighty (80), more or less, acres, reserving, however, the right of way to the said railroad co. two hundred feet wide, where the track of the railroad has been or may be laid over said land, to have and to hold to the said grantee and his heirs and assigns forever, to their own use and behoof, and the said grantor doth hereby agree with the said grantee; and, furthermore, the said grantor doth covenant with the said grantee, his heirs and assigns, their peaceable possession of the said premises against all lawful claims, forever to warrant and defend against all persons whomsoever claiming under, by, or through us. In witness of which the said grantor hath hereto set its seal and caused these presents to be signed by its treasurer and countersigned by its land agent this 17th day of January, 1870.

J. N. DENNISON, *Treasurer.*

GEO. S. HARRIS, *Land Commissioner.*

(Duly acknowledged.)

Release.

Whereas the B. & M. R. R. Co. did, on the 1st of October, 1858, execute and deliver to John M. Forbes, Henry P. Kidder, of Boston, Massachusetts, and John N. A. Griswold, of the city and State of New York, a certain mortgage deed of that date, which deed is recorded in the recorder's office of Mills County and State of Iowa, wherein said company conveyed to said Forbes, Kidder, and Griswold, for the uses and purposes
142 therein mentioned, among other lands the following described real

estate lying and being in the county of Mills, in the State of Iowa, to wit, the E. ½ of SW. ¼, sec. 1, tp. 73, r. 42; and whereas the said company, with the assent and approval of said Forbes, Kidder, and Griswold, have sold and conveyed unto H. C. Watkins the real estate described above for the consideration of one hundred dollars to it in hand paid by H. C. Watkins, which sum of money has been paid to us by said company in our capacity as trustees of said mortgage deed for the uses and purposes therein mentioned: Now, know all men by these presents that we, the undersigned, a majority of the trustees in the aforesaid mortgage deed, in consideration of the aforesaid premises and payment of said sum of one hundred dollars to us by said company for the uses and purposes aforesaid. do hereby remise, release, and forever quitclaim unto the said H. C. Watkins, the real estate described aforesaid, to be held by him free and exempt from all liens, encumbrances, or charges of said mortgage deed. In testimony whereof we have hereunto set our hands and seals this 24th day of January, A. D. 1870.

[L. S.] A. W. FORBES,
[L. S.] H. P. KIDDER,
Trustees.

In presence of—
F. G. WEBSTER.
A. W. ADAMS.

(Duly acknowledged).

DEED No. 2. Dated Sept. 23, 1872, substantially in same form as preceding, conveying to P. P. Johnson, of Montgomery County, for a consideration of $32.00, the NE. SW. and SE. NE., 7, 72, 40, eighty acres, signed by Dennison and Harris, and duly acknowledged, and having attached thereto a release, substantially the same as that annexed to deed No. 1, signed by J. W. Brooks and H. P. Kidder, trustees.

DEED No. 3. Dated Feb. 6, 1871, substantially in same form as No. 1, preceding, conveying to Josiah Wearin, for a consideration of $500.00, the SW. ¼ sec. 13, and N. ½ NE. ¼, and SW. NE. of sec. 23, all in T. 143 72, R. 41, 280 acres, signed by Dennison and Harris and duly acknowledged. Release of mortgage signed by Forbes and Kidder, trustees, and duly acknowleged.

DEED No. 4. Dated Jan. 17, 1870, substantially in same form as No. 1, conveying, for a consideration of $100.00, the E. ½ NE. ¼ sec. 33, 71, 41, eighty acres to H. W. Summers, signed by Dennison and Harris, and duly acknowledged. Release of mortgage, signed by Forbes and Kidder, trustees, and duly acknowleged.

DEED No. 5. Dated Jan. 17, 1870, substantially in same form as No. 1, conveying, for a consideration of $50.00, the SW. NE. sec. 24, T. 72, R. 41, to D. N. Smith, signed by Dennison and Harris, and duly acknowledged. Release of mortgage signed by Forbes and Kidder, trustees, and duly acknowledged.

DEED No. 6. Dated April 12, 1871, substantially in same form as No. 1, conveying, for a consideration of $97.90, the N. ½ NW. ¼ 7, 72, 40, to Andrew Wearin, signed by Dennison and Harris, and duly acknowledged. Release of mortgage signed by Forbes and Kidder, and duly acknowledged.

DEED No. 7. Substantially in same form as No. 1, dated April 12, 1871, conveying, for a consideration of $100.59, the W. ½. SW. ¼ 7, 72, 40, to Harry Wearin, signed by Dennison and Harris, and duly acknowledged. Release of mortgage signed by Forbes and Kidder, and duly acknowledged.

DEED No. 8. Substantially in same form as No. 1, dated January 17, 1870, conveying, for a consideration of $50.00, the NE. NW. 31, 73, 42, to D. C. Briggs, signed by Dennison and Harris, and duly acknowleged. Release of mortgage signed by Forbes and Kidder, and duly acknowledged.

144 And the issue being thus joined the cause came on for final hearing at the February term, 1876, of the district court of Mills County, Iowa, and the pl'ff, to sustain the issues on her part, offered the following evidence:

Plaintiff's evidence in chief.

I. WOOSTER FAY, being sworn, said:

In the summer of 1868 I resided in Keg Creek Tp., Pottawattamie County, Iowa; in that year surveying party No. 4, under Engineer Haven, surveyed a route through said Keg Creek Tp. under the direction of the B. & M. R. R. Co., from Red Oak to Council Bluffs; this party camped in my door yard four or five weeks; think the party left the work and went eastward in July; about the time of leaving Engineer Haven told me that we would not get the road—that it would be built through to Glenwood; when I told him the survey was a big expense to the company, he said it had cost $6,000, but that the company had made $100,000 out of Mills County; when I asked him how, he answered, "They have withdrawn the swamp-land suit, given us a free right of way and depot grounds at Glenwood—that is, citizens of Glenwood would buy the right of way from the farmers;" the party left that day and never returned to the survey again; prior to this Haven told me of a conversation he with a Glenwood man, in which the latter asked him if he could build a road from Red Oak to Council Bluffs, to which Haven answered, "Yes, a quarter of a million cheaper than through Glenwood;" whilst the party were camped in my yard, Haven went with me a time or two to Council Bluffs, and charged me not to introduce him to citizens of Council Bluffs—said he did not want to be bored; party No. 4 consisted of six or eight persons and included Noah Hanks; this party left my place and camped near Council Bluffs, on Glenwood road, for a time, and then camped again in my yard; during this time the railroad company were not building any road west of Red Oak.

II. NOAH HANKS, being sworn, said:

I was a member of party No. 2 sent out by the B. & M. R. R. Co.;
145 Chief Engineer Teilson had immediate charge of No. 2; early in the season of 1868 No. 2 come to Glenwood from Red Oak; I had been with the party a month at that time; it was the understanding with our party before we left Red Oak that the road was to be built through Glenwood on the route that we were about to survey; we got this from the way Teilson talked; he said he wished to establish part of the line about Glenwood—that that would be the permanent line through Glen-

wood—making an intersection with the St. Joe road; he told us not to talk too much, that we were not to know anything about it; it was to be the final route, but we were not to tell it; this understanding and talk was at Red Oak; there were three parties there at the time, Nos. 1, 3, and 4; we left Burlington in March or April, and were about a month in reaching Red Oak; my party, No. 2, came on to Glenwood, and went to work running routes down Keg Creek through Glenwood; we run the route where the road now is; I stayed with No. 2 until this survey was made, and then, under Teilson's orders, went to Red Oak and joined No. 4, under Haven, and remained with No. 4 till August, working from Red Oak to Council Bluffs, running a trial line, and whilst running this trial line Teilson (chief engineer) was with our party every once in a while; Haven and Teilson had their private talks together at Indian Creek, Mosquito Creek, and twice at Council Bluffs.

Cross-examination:

Can't say exactly when survey through Glenwood (by party No. 2) was made; it might have been in June; we ran several trial lines through Glenwood—can't say that these were to influence or scare the people of Glenwood; it is common to run trial lines before final location; the engineers often talk together—they do this to keep the boys from talking too much; the line from Red Oak to Council Bluffs was a trial line.

Redirect:

After running the trial line from Red Oak to Council Bluffs, we run back and located about half of it; at first our work was done with great care, but towards the last Haven, the transit man, told us we need not be so particular, as the probability was the road would go through
146 Glenwood; this was towards the last of the survey, in August; we returned to Burlington, reaching there August 17th, 1868.

Recross:

We were in Anderson T'p from the 8th to the latter part of July, and during this time were visited by members of other surveying parties, not citizens of Glenwood.

III. E. C. BOSBYSHELL, being sworn, says:

I have lived in Mills Co. since 1856, engaged in merchandising; was county judge in 1857–'8; knew J. F. Joy; first met him on a steamboat on my way to St. Joe; think he was president of the B. & M. R. R. Co. at the time; he told me on this occasion that he did not know whether they were going to run the road through Mills Co. or not; that his company hated to run a road through the country where the people were fighting them; that it was hard to run a road through when the people were fighting all the time. I told him I did not know that we were fighting; then he said this suit, referring to the suit then pending of Mills County vs. The B. & M. R. R. Co.; that the people ought to go to work and settle it, or have it settled; that in these times nobody was independent of railroads; that he did not want to run a road through a county where the people were fighting him; that he did not know, could not tell, where the road would be built; don't think he said that the road would probably have two ends; prior to this the company had run a line from

Red Oak to Nebraska City, and I think I suggested to Joy that if they built on that line they would not run to Glenwood also; that was my idea of the battle, but I don't think he said anything about that; this conversation was some time before the company commenced work in Mills County; when I came home I related this conversation with Joy to quite a number of my friends here; I was one of the committee sent to Burlington in July, 1868, with the celebrated proposition; when we started it was a question of great doubt whether or not we would get the road through Mills County; there was some excitement, and everybody was interested, more or less, to have the road. Mr. Perkins said to the committee
147 at Burlington that the company would require the right of way through the county if they ever ran a road there, and that he did not know that we could get it then; he wanted the county or private individuals to guarantee a free right of way. Mr. Perkins also said something about the remission of taxes for two years; said he could not guarantee what the company would do; that he would submit our proposition to the directors, and would let us know what was done. After our committee came back from Burlington a bond, signed by two hundred citizens of Mills County, guaranteeing right of way, was forwarded to the company and declined because of its numerous signers; then another one, signed by a few of us, was gotten up; under this arrangement we went around and got some of the right of way released, and the residue was afterwards condemned and paid for, partly by taxation and partly by private subscription; our committee to go to Burlington was appointed June 2d, but we did not start until July 11th.

Cross-examination:

The proposition submitted by the committee was prepared at Burlington in the Barrett House; it was after we had submitted the written proposition that Perkins brought up the questions of right of way and taxes; our authority did not go beyond the written proposition; I could not say that before our appointment there was no talk among the citizens or fears expressed that influenced or affected the proposition; I think the citizens here were anxious to have a railroad, and at that time did not know where it would go; I think the railroad company did nothing to bring about the proposition; the object was to quiet the titles and get the railroad too; that was my idea.

Redirect:

I did not mean to say in my cross-examination that there was no feeling or solicitude in regard to where the road would go, and that that was no part of the feeling which caused us to make the proposition; there was really a great desire prevailing in the minds of all parties interested in that proposition to secure the road; we were all anxious to have it; the board of supervisors probably authorized the proposition for the purpose
148 in part of securing the road; the written proposition was just what it says it is.

IV. Resolution (Transcript, pp. 628 and 866) of board of supervisors at June session, 1868:

"On motion of Mr. Wing, Wm. Hale, E. C. Bosbyshell, L. W. Tubbs, D. H. Solomon, and S. Christy were appointed a committee to confer and treat with the B. & M. R. R. Co., with a view to settling the points in controversy between the said company and the county."

VI. Minute book (Transcript, pp. 628, 850, and 864) of the board of supervisors, showing the report of committee appointed by the resolution aforesaid, containing the proposition submitted to the B. & M. R. R. Co. and the action of the board on said contract. (See Abstract, pp. 21 and 23, for copy of same.)

VII. Minute book of the board of supervisors of Mills County (Transcript, pp. 628, 870, and 872), showing proceedings of board at the adjourned session held June 19th, 1871, ordering a submission of the proposition for a contract to a vote of the people at October election in that year, viz:

"The special business which called the board together at this time was then taken up, to wit, the matter of submitting to the qualified electors of Mills County the question of approval of an agreement made between the board of supervisors of Mills County and The B. & M. R. R. Co., in the settlement of the swamp-land difficulties, and, after due consideration, the following resolution was passed by the board, viz:

"Resolved, That the question be submitted to the electors of Mills County at the next general election whether the said electors will or will not approve of the agreement entered into between The County of Mills and The B. & M. R. R. Co., dated 10th of November, 1868, to settle the swamp-land suit between the county and said company then pending in the Supreme Court of the United States.

"On motion, it was ordered that the auditor be, and is hereby, instructed to cause the agreement between the county and railroad company referred to in the resolution this day passed to be published in full in the county papers in connection with the notice of the submission of the question contained in said resolution."

149 VIII. J. M. POWELL, being sworn, says:

I am county auditor. The record here produced is the election record, and the same shows the recording of the votes taken on the contract between Mills County and The B. & M. R. R. Co. This record, with other things, shows the following (Transcript, pp. 865–'6 and 891–'6):

"BOARD SUPERVISORS, OCT. TERM, 1871,
"*Monday Morning, Oct.* 16, 1871.

Board met pursuant to adjournment. Present, Chairman Buffington, Supervisors Creech and Whitfield. The auditor then presented the poll-books of the several townships, and the board proceeded to open the same and canvass the votes of Mills County cast at the general election held on the 10th day of October, 1871, the result of which canvass is as follows," so far as the same relates to the submission of said contract to a vote: * * *

"For and against ratification of the contract with the B. & M. R. R. Co. there were 1,383 votes cast. * * * For ratifying the contract with the B. & M. R. R. Co. 1,031 votes cast, and against ratifying 357. * * * We, the undersigned, members of the board of supervisors and ex officio board of county canvassers for said county, do hereby certify that the foregoing is a correct abstract of the votes cast at the aforesaid election, according to the poll-books returned from the several townships in said

county. We further certify that at said election the following persons were duly elected to the office stated opposite their respective names:

"A. R. Wright, representative." * * *

And at the end of the list there was added the following:

"Against ratifying the contract with the B. & M. R. R. Co."

"In testimony whereof we have hereunto set our hands and caused this to be attested by the clerk, and sealed by the seal of the board of supervisors of said county, this 17th day of October, 1871.

"[L. S.]

"B. F. BUFFINGTON,
"BENNETT CREECH,
"D. M. WHITFIELD,
"*Members of Board of Canvassers.*

"D. M. WHITFIELD, *Auditor.*"

VIII. D. M. MITCHELL, being sworn, said:

I was county auditor in 1871. (Witness was here shown the election book and abstract of election held Oct. 10th, 1871, and is asked if he affixed his signature thereto.) That is my signature. I made the
150 entries. I feel satisfied, from a clear recollection of the fact that there is an error in one statement, viz, "For ratifying the contract of B. & M. R. R. Co. 1,031 votes cast; against ratifying, 357." The words "for" and "against" should be changed so as to make it read, "Against ratifying the contract of B. & M. R. R. Co., 1,031 votes cast; for ratifying, 357." The statement at the end of the abstract, just before the signatures, "Against ratifying the contract with the B. & M. R. R. Co.," correctly states the result of the vote on the contract.

Cross-examination:

I have made my answers in chief from my best recollection of the facts; it is possible that I may be mistaken, but I have no doubt of the truth of my answers; I fully believe them.

IX. D. M. WHITFIELD, being sworn, said:

I was a member of the board of supervisors in October, 1871, and signed the abstract of election held in that month; I recognize my signature; the abstract does not correctly state the vote; there were in fact 1,031 votes cast against ratifying, and 357 for ratifying; the recital just over our signatures recites the fact as to result; it was against ratifying.

Cross-examination:

The auditor reads out the proceedings and abstracts, but did not read it as it is written, else I should have discovered it.

X. JOSIAH WEARIN, being sworn, said:

The papers shown me are receipts given me for purchase money of lands therein described. I know that Mr. King, the person signing, was agent of the railroad company. The lands are pre-empted swamp lands. The receipts are as follows. (Transcript p. 645):

GLENWOOD, IOWA, *April* 19, 1871.

Received of Josiah Wearin the sum of $50, which is paid me as agent of the B. & M. R. R. Co., the same being the amount of the purchase-

money due said company on the NW. SW. 29, 73, 40, in Mills County, Iowa; this being in accordance with the contract between Mills County and said railroad company in settling the swamp-land complications.

(Signed) J. M. KING,
Agent B. & M. R. R. Co.

151 The other receipt is in same form, is dated May 11, 1871, and describes SW. NW. 29, 73, 40.

XI. J. W. POWELL, recalled:

I have on file in my office, as part of the records thereof, receipts signed by persons purporting to be agents of the B. & M. R. R. R. Co. for moneys paid to the company by different persons upon the lands described in each receipt. (Here fifteen separate receipts were produced and read in evidence, covering $1,675 in money.) (See Abstract, p. 26, for the substance of said receipts.)

XII. The pl'ff next offered, and by consent of def'ts the same were regarded as in evidence, the following acts of Congress and of the general assembly of the State of Iowa (Transcript, pp. 649 to 653): An act of Congress approved Sept. 28, 1850, entitled "An act to enable the State of Arkansas and other States to reclaim the swamp lands within their limits;" also chapter 60 of the laws of the third general assembly of Iowa, which took effect Feb. 26th, 1851, entitled "An act in relation to the swamp lands within the State of Iowa;" also chapter 13, laws fourth general assembly, which took effect Feb. 2d, 1853, entitled "An act to dispose of the swamp and overflowed lands within the State, and to pay the expenses of selecting and surveying the same;" also chapter 65 of same assembly, which took effect July 1st, 1858, entitled "An act supplemental to an act entitled 'an act to dispose of the swamp and overflowed lands within the State, and to pay the expenses of selecting and surveying the same;'" also an act of the fifth general assembly, which took effect July 1st, 1855, being chapter 138, and entitled "An act providing for the collection of moneys due the State of Iowa from the disposition of swamp lands, and for selecting the swamp lands and securing the titles to the same;" also chapter 110, fifth general assembly, which took effect Feb. 21st, 1855, entitled "An act to amend an act entitled 'An act to dispose of the swamp and overflowed lands within this State,'" approved Jan. 13th, 1853; also chapter 36, fifth general assembly, extra session, passed July 15th, 1856, entitled "An act to amend an act entitled 'an act to dispose
152 of the swamp and overflowed lands within this State, and to pay the expenses of selecting and surveying the same;'" also chap. 156, fifth general assembly, which took effect Jan. 13th, 1855, entitled *a* "A bill to prevent trespass and waste on swamp and other lands in the State of Iowa, and for other purposes;" also chapter 115, sixth general assembly, which took effect July 1st, 1857, entitled "An act in relation to the swamp lands of this State;" also chapter 100, seventh general assembly, which took effect April 7th, 1858, entitled "An act for the relief of swamp lands pre-emptors;" also chapter 3, seventh general assembly, which took effect Feb. 11th, 1858, entitled "An act making an appropriation for swamp land purposes;" also chapter 132, seventh general assembly, passed March 22d, 1858, entitled "An act to authorize counties to use the swamp lands

to aid in the construction of railroads and seminaries;" also chapter 77, ninth general assembly, passed March 31st, 1862, entitled "An act to amend sec. 986 of the revision of 1860 in relation to the swamp lands;" and in connection with that we offer and refer to sections 986, 987, 988, 989, and 990 as the portions referred to in session laws of 1862; also an act of Congress, approved March 3d, 1857, entitled "An act to confirm to the several States the swamp and overflowed lands selected under acts of Sept. 28, 1850, with the act of the 2d of March, 1849;" the act of Congress approved May 15, 1856, entitled "An act making a grant of the lands of the State of Iowa, in alternate sections, to aid in the construction of certain railroads in said State;" and also act of the general assembly, passed July 14th, 1856, entitled "An act to accept the grant and carry into execution the trust conferred upon the State of Iowa by the act of May 15th, 1856, entitled 'An act making a grant of lands in the State of Iowa, in alternate sections, to aid in the construction of certain railroads in said State.'"

XIII. Pl'ff next read in evidence the articles of incorporation of the B. & M. R. R. Co., viz: Original articles, dated January 15th, 1852, for the construction of a railroad from Burlington to the Missouri River, and filed in office of secretary of state, January 23d, 1852. Also amendments to original articles, made November 25th, 1853, and filed in office
153 of secretary of state November 27th, 1853; also amendments to original articles, made April 28th, 1864, and filed in office of secretary of state May 16th, 1865; also amendment to original articles, made December 18th, 1867, and the further amendments made June 23d, 1869, and filed in the office of secretary of state September 25th, 1869 (Transcript, pp. 752–773).

Article 10 of the original articles reads as follows:

"The object of this incorporation is to construct and use a railroad extending from Burlington to the most eligible point on the Missouri River, and along the most eligible route." (Transcript, pp. 653 and 755.)

And among the amendments last above referred to is the following:

"Moved by C. E. Perkins that article ten (10) of the articles of incorporation be, and it is hereby, amended by inserting after the word 'point' the words 'or points,' so as to read, 'to the most eligible point or points on the Missouri River.'"

The motion of Mr. Perkins was adopted by a unanimous vote, and declared carried by the chair. (Transcript, pp. 653 and 772.)

XIV. Pl'ff next read in evidence the written acceptance by the B. & M. R. R. Co. of the grant of general assembly of the State of Iowa, approved July 14th, 1856. (Transcript, pp. 653 and 774–'6.)

OFFICE B. & M. R. R. CO.,
Burlington, Iowa, Sept. 3, 1856.

At a regular meeting of the board of directors of said company held this day the following resolution was unanimously adopted:

Resolved, That the act of the general assembly of the State of Iowa, approved July 14th, 1856, entitled "An act to accept the grant and carry into execution the trust conferred upon the State of Iowa by an act of Congress entitled 'An act making a grant of lands to the State of Iowa

in alternate sections, to aid in the construction of railroads in said State,'" approved May 15th, 1856, be, and the same is hereby, accepted by this company, and all provisions of the same are hereby assented to.

W. F. COOLBAUGH,
President.

Attest:
OLIVER COCK, *Secretary.*

With the seal of the company hereto affixed Sept. 3d, 1856. Filed Sept 6th, 1856.

G. W. McCLEARY,
Secretary of State.

154 XV. Pl'ff next read in evidence the certificate and map of location of the B. & M. R. R. Co., under date March 24th, 1857, filed in office of secretary of state March 27th, 1857. (Transcript, pp. 654 and 778.)

OFFICE OF THE B. & M. R. R. Co.,
Burlington, Iowa, March 24th, 1857.

It is hereby certified that in pursuance of the act of legislative assembly of the State of Iowa approved July 14th, 1856, entitled "An act to accept of and carry into effect the trust conferred upon the State of Iowa by an act of Congress entitled 'An act making a grant of lands to the State of Iowa, in alternate sections, to aid in the construction of certain railroads in said State,' approved May 15th, 1856." This map shows the location and route of the B. & M. R. R. from Burlington, on the Mississippi River, to a point on the Missouri River near the mouth of Platte River, in the State of Iowa, as definitely fixed in compliance with the said act of the legislative assembly of the State of Iowa and the said act of Congress and in pursuance of the orders of directors of the B. & M. R. R. Co.; that said map truly represents the precise times when said sections or part of the determinative line of said road was fixed on the face of the earth by the usual and proper marking of the same, and by the execution of the field work thereof; that so much of said work as was executed prior to the 15th day of May, 1856, is included between the points designated on said map by station flags marked No. 1 and No. 2, and that the remainder was marked and executed on the respective days indicated along the line between the points designated by flags from No. 2 to No. 62, inclusive; that the several dates and points so marked were taken from the engineer's original field-notes of survey and location of said line, and that the marking of the line and field work above referred to was executed by and under the direction of the chief engineer of said railroad, in accordance with the orders of the board of directors of said company.

In testimony whereof the said B. & M. R. R. Co. has hereunto attached its corporate seal, and caused the same to be signed by the president and chief engineer, at Burlington, this 24th day of March, 1857.

W. F. COOLBAUGH,
President B. & M. R. R.
H. S. THIELSON,
Chief Engineer B. & M. R. R.

Attest:
OLIVER COCK, *Sec'y B. & M. R. R.*

Filed in the office of the secretary of state March 27th, 1857.
ELIJAH SELLS,
Secretary of State.

155 Map and certificate duly authenticated by certificate of Josiah T. Young, secretary of state.

XVI. At this point in the trial the following agreement was made by the parties in open court and entered of record, viz: "It is agreed that the lands in controversy were selected as swamp lands in the list returned to the General Land Office in 1854, and which was filed in that office prior to the passage of the act of Congress approved March 3d, 1857, with a few exceptional tracts. It is admitted that the B. & M. R. R. Co. received acres of land, which are described as clear-list lands, in pursuance of an act of Congress approved May 15, 1856, and an act of the State legislature in pursuance of that act of Congress, and the parties' understanding of the clear list for the purposes of this admission is that it embraces lands not now or heretofore in controversy.

XVII. Pl'ff next read in evidence the original and amended petitions, the original and amended answers thereto, and the decree in the case of Mills County, Iowa, vs. B. & M. R. R. Co., commenced Dec. 1st, 1863, in the district court of Iowa for Mills County.

Original petition in former action.

In the district court of Mills County, Iowa, of the term of February, 1864.

MILLS COUNTY
vs.
BURLINGTON AND MISSOURI RIVER R. R. CO. } Petition in equity.

To the district court of Mills County, Iowa, in chancery, sitting:

Your complainant, the County of Mills, in the State of Iowa, respectively represents to this court that she is the owner of and possesses the legal title to the various tracts of land hereinafter described and attached to this bill and made a part hereof, situated in Mills County, Iowa, by virtue of an act of the Congress of the United States of America approved September 28th, 1850, granting the same to the State of Iowa, and by virtue of the act of the legislature of the State of Iowa approved January 13th, 1853, and the acts supplementary thereto; that the said lands referred to were duly selected under the acts of Congress and the legislature of the State of Iowa, above referred to, by the
156 proper authorities, as swamp and overflowed lands, and the selection so made and returned as required by law was confirmed by the subsequent act of Congress approved March 3d, 1857.

2d. Complainant further showeth that said respondent, The B. & M. R. R. Co., pretends to claim and own the said lands hereinafter described, by virtue of an act of the Congress of the United States of America approved May 15th, 1856, and also certain acts of the legislature of the State of Iowa. Complainant further states that she has

made divers contracts of sale to individuals for a portion of the land referred to, but that she has not conveyed the same, and still holds the legal title thereto vested in her by the acts referred to; further, that respondent sets up title thereto as aforesaid, threatens suits, and offers the same for sale, and, in fact, has made contracts for the sale of a portion of the same, thus casting a cloud over the title of complainant, and raising doubts as to the capacity to convey.

Your complainant therefore prays this court, on the final hearing of this cause, that a decree be entered up decreeing fully and completely the title to the lands hereinafter described to be in complainants, and for such other and further relief as equity and good conscience may seem meet and proper, and your petitioner will ever pray.

EWING & HALE,
Att'ys for Complainant.

(For Exhibit A, referred to in petition, see Abstract, pp. 12 and 13.)
Filed December 1st, 1863. H. A. Copeland, clerk d. c.

Amended petition in former action.

In the district courts of Mills County, Iowa. February term, 1864.

MILLS COUNTY
vs.
THE BURLINGTON AND MISSOURI RIVER RAILROAD CO. } Amended petition.

To the district court of Mills County, in chancery sitting:

Comes now your petitioner and for amended petition herein represents: That by virtue of an act of Congress, approved September 28th, 1850, entitled "An act to enable the State of Arkansas and other States to reclaim the swamp lands within their limits," and by virtue of an act of the general assembly of the State of Iowa, entitled "An act to dispose of the swamp and overflowed lands within this State, and to pay the
157 expenses of selecting and surveying the same," passed January 13, 1853, and other acts of said general assembly supplementary thereto, and by virtue of an act of Congress, entitled "An act to confirm to the several States the swamp and overflowed lands selected under the act of Sept. 28, 1850, and the act of the 2d of March, 1849," approved March 3d, 1857, your petitioner, the County of Mills, in the State of Iowa, became the owner of the several tracts of land hereinafter specified, and more particularly designated and described in the list of said lands hereunto attached and made a part of this petition. Your petitioner says that said land' were duly and legally selected and returned as swamp and overflowed lands under said acts, and that by virtue of said several acts of Congress and the general assembly, your petitioner became the owner of the same and entitled thereto in fee simple, and to the full, free, and uninterrupted possession, use, and enjoyment of the same. Your petitioner further states that, relying in good faith upon her right in and to said several tracts of land acquired by virtue of the acts aforesaid, she has made divers contracts of sale to various individual citizens of said county and State, for numerous tracts of said lands, but that she has not conveyed

and under date of the respective exhibits hereto annexed, by the proper authority of the United States under and by virtue of said acts of Congress and legislative acts, as will more fully appear by certified copies of lists and certificates setting off the same hereto annexed as a part of this answer, and
160 respectively marked "A," "B," "C," and "D," the original of which will be produced and read in evidence in the trial of this cause, which said lists and certificates confer legal title to said lands on this def't, and by virtue of which def't makes and claims title thereto. Wherefore this def't denies the right of complainant to said lands (except the tract disclaimed as aforesaid), and says that this def't has the better legal and equitable title thereto, and to each and every tract and parcel thereof. Def't also denies the right of complainant to the relief claimed, and all relief whatever, and asks that complainant's bill be dismissed.* And this def't, answering, further says that the said railroad and the line and route thereof was actually surveyed and marked out on the ground as the permanent route thereof through the said county of Mills, in the State of Iowa, on and between the 9th day of October, 1856, and the 15th day of October, 1856, by the route and line laid down and designated on the plat thereof and of the adjacent lands hereto annexed and marked Exhibit — to def't's answer, and which is given as and made a part of this answer, with all the markings, writings, figures and illustrations, localities and dates thereon entered and laid down, and all of which def't avers are true and correct in point of fact; and that said railroad line was thereafter, to wit, on the 24th day March, 1857, formally adopted by said railroad company as the permanent line of said railroad through said Mills County, and that said adoption, when so made, related back to the times of the said actual survey and marking of the different sections indicated by flags on the line of said road, and that such different sections were respectively so surveyed and located and marked on the respective days thereto entered and marked severally between said flags on said map, all which is given as a part of this answer. And now, having fully answered, def't prays to be dismissed with judgment for def't's costs.

DAVID RORER,
Attorney and Solicitor for Def't.

GENERAL LAND OFFICE, *March* 25, 1862.

I, J. M. Edmunds, Commissioner of the General Land Office, do hereby certify the annexed, from page 1 to 5, inclusive, is a true and literal exemplification of the original approved list on file in this office.

{SEAL OF THE U. S. GENERAL LAND OFFICE.} In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

J. M. EDMUNDS,
Commissioner of the General Land Office.

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EXHIBIT A.

B. & M. R. R.—Supplemental list of lands—Act of May, 1856—Council Bluffs district, Iowa—North of the base line and west of the fifth principal meridian, Iowa—The B. & M. R. R.—Railroad list—Six mile limits, approved March 21st, 1862.

No.	Parts of sections.	Sec.	T'p.	R'ge.	Acres.
1	NE. NW	3	71	34	35.61
2	SW. NE. and NE. SW	3	71	34	80
3	SW. SW	3	71	34	40
4	SE. SE	5	71	34	40
5	W. h. SW. and NE. SE	7	71	34	134.95
6	NE. NE. and SE. SW	31	72	34	80
7	S. h. NE	35	72	34	80
8	NW. NW	19	70	35	35.50
9	W. h. SW	1	71	35	80
10	NE. NW. and SW. NW. and S. h. NE	11	71	35	160
11	N. h. SE. and SE. SE	11	71	35	120
12	W. h. NW	15	71	35	80
13	NE. NE. and SE. q. and SE. SW	17	71	35	240
14	NE. SW	17	71	35	40
15	SE. SE	17	71	35	40
16	SE. SE. and SW	31	71	35	200
17	SE	11	72	35	160
18	S. h. NE. and NW. NE	15	72	35	120
19	S. h. NW. and NW. SE	15	72	35	120
20	N. h	29	72	35	320
21	E. h. NE. and E. h. SE	5	70	36	160.09
22	N. h. SW	9	70	36	80
23	E. h. NE	17	70	36	80
24	W. h. SE. and SE. SE	21	70	36	120
25	E. h. SW. and E. h. NW	21	70	36	160
26	E. h. SW. and SW. SW	3	71	36	120
27	E. h. SE	9	71	36	80
28	E. h. SE	21	71	36	80
29	W. h. NW. and NE. NW	23	71	36	120
30	NE. SE	27	71	36	40
31	SW. SE	21	72	36	40
32	E. h. NW. and E. h. SW	9	71	37	160
33	W. h. NE. and NE. NW	29	71	37	120
34	W. h. NE. and NE. SW	33	71	37	120
35	W. h. NE. and SW	7	71	38	237.89
36	NW. NE	17	72	38	40
					3,964.13

SAM'L J. KIRKWOOD.

162 EXHIBIT A—Continued.

North of base line and west of the fifth principal meridian, Iowa—The B. & M. R. R—Council Bluffs district—Railroad list—Six miles limits.

No.	Parts of sections.	Sec.	T'p.	R'ge.	Acres.
1	W. h. SW. and NE. SW	29	72	38	120
2	E. h. SW. and SW. NE	31	72	"	120
3	SW. SW	31	73	"	36.65
4	W. h. SE. and SW. NE	1	71	39	120
5	S. h. NW	17	"	"	80
6	E. h. NE	19	"	"	80
7	SW. SE	11	72	"	40
8	NE. NW	23	"	"	40
9	NW. NE	27	"	"	40
10	W. h. NE. and SW. NE. and N. h. NW.	5	"	40	146.95
11	SE. NW. and SW. SW	5	"	"	80
12	W. h. sec. and NE. q. E. h. SE	7	"	"	557.88
13	E. h. NE. and W. h. NW	17	"	"	160
14	N. h. sec	19	"	"	321.93
15	S. h. sec	21	73	"	320
16	E. h. sec. and NW	29	"	"	480
17	N. h. SW. and SE. SW	29	"	"	120
18	W. h. sec. and W. h. NE	31	"	"	320.44
19	SE. q. and NE. NE	31	"	"	200
20	Whole of	9	71	41	640
21	NW. q. and W. h. SW. and NW. SE	11	"	"	280
22	Whole of	15	"	"	640
23	NE. NE	17	"	"	40
	E. h. sec., SW. q. and NE. NW	21	"	"	520
	W. h. sec., W. h. NE	27	"	"	400
	SE. q. & E. h. NE. & E. h. NW. q. E. h. SW. & NW. SW	29	"	"	440
	SE. q. and E. h. SW	1	72	"	240
	S. h. sec., E. h. NE. and NW. NE	13	"	"	440
	S. h. NW	19	"	"	80.81
	E. h. sec. SW. q. and E. h NW	23	"	"	560
	W. h. sec. and NE	25	"	"	480
	NE. q. and E. h. SE	21	"	"	240
	SW	29	"	"	160
	E. h. sec., SW. q. NW. NW	35	"	"	520
	SW. SW	19	73	"	35.17
	E. h. NW. and W. h. NE	19	"	42	19.60
	W. h. SE. and SE. SW	19	"	"	120
					9,439.90

SAMUEL J. KIRKWOOD.

163 EXHIBIT A—Continued.

North of base line and west of the 5th principal meridian, Iowa—The B. & M. R. R. list—Council Bluffs district—Six mile limits.

No.	Parts of sections.	Sec.	T'p.	R'ge.	Acres.
1	N. h. NE	25	73	42	80
2	NE. NW. and SW. NE	31	"	"	80
3	NW. SE	31	"	"	40
4	NW. and W. h. SE	1	71	43	219.46
5	N. h. section SE	3	"	"	451.24
6	E. h. SW. and NW. SW	3	"	"	120
7	NW. SE. S. h. and N. h. SW	5	"	"	451.47
8	W. h. sec., E. h. SE. and W. h. NE	9	"	"	480
9	N. h. NE. and N. h. NW	11	"	"	160
10	S. h. sec. and W. h. NW	17	72	"	400
11	NE. NE	19	"	"	40
12	W. h. sec., W. h. NE. and NE. NE	5	"	"	403.88
13	SW. NW	7	"	"	41.50
14	NE	9	"	"	160
15	SE	17	"	"	160
16	W. h. sec	19	"	"	320.12
17	Whole of	21	"	"	640
18	SW. SW	23	"	"	40
19	Whole of	27	"	"	640
20	E. h. sec., SW. and W. h. NW	29	"	"	560
21	E. h. sec	31	"	"	320
22	W. h. sec., W. h. NE. and W. h. SE	33	"	"	480
23	E. h. sec. and S. h. NW	35	"	"	400
24	S. h. NE. and E. h. S E. and NW. NW	19	"	"	201.30
25	W. h. NE. and W. h. SE	31	"	"	160
26	Whole of	1	"	44	542.95
27	Lot 1	11	"	"	15.68
28	W. h. NE. and NE. NW	13	"	"	120
29	NW. SE. and NE. SW	13	"	"	80
30	E. h. NW. and W. h. NE	25	"	"	160
31	W. h. SE. and NE. SW	25	"	"	120
32	Lots 2 and 3	23	73	"	64.50
33	Whole of	27	"	"	12.60
34	Lots 1, 2, and 3, and NE. NW	35	"	"	191.27
					8,335.98

Making a total of 21,740 acres and one-hundredth of an acre.

SAMUEL J. KIRKWOOD.

164 GENERAL LAND OFFICE, *March 14th*, 1862.

I, J. M. Edmunds, Commissioner of the General Land Office, do hereby certify that the foregoing, on pages 1 to 4, inclusive, is a true and correct list of the tracts of land within the six-mile limits granted to the State of Iowa by an act of Congress approved the 15th of May, 1856, entitled "An act making a grant of lands to the State of Iowa, in alternate sections, to aid in the construction of certain railroads in said State, being the vacant and unappropriated lands in the alternate sections designated by odd numbers, for six sections in width on each side of the railroad from Burlington, on the Mississippi River, to a point on the Missouri River near the mouth of the Platte River," known as "The B. & M. R. R., within the State of Iowa," and they are now submitted for the approval of the Secretary of the Interior, in accordance with the requirements of said act of 15th of May, 1856, subject to all its conditions, and to any valid interfering rights which may exist to any of the tracts embraced in the foregoing list.

In testimony whereof I have hereunto subscribed my name, and caused the seal of the General Land Office to be affixed, at the city of Washington, on the day and year first herein above written.

[SEAL.] J. M. EDMUNDS,
Commissioner.

DEPARTMENT OF THE INTERIOR,
March 21st, 1862.

Approved, subject to the conditions and rights above mentioned.
CALEB B. SMITH, *Secretary.*
SAMUEL J. KIRKWOOD.

UNITED STATES OF AMERICA,
State of Iowa, ss:

Know that I, Samuel J. Kirkwood, governor of the State of Iowa, and keeper of the great seal thereof, do hereby certify that the foregoing papers, that is to say, a paper purporting to be a certificate of J. M. Edmunds, Commissioner of the General Land Office, dated General Land Office, March 25th, 1862, also a paper purporting to be a supplemental list of the lands subject to sale at Council Bluffs within the six-mile limits, granted to the State of Iowa by the act of Congress approved the 15th May, 1856, entitled "An act making a grant of lands to the State of Iowa, in alternate sections, to aid in the construction of certain railroads in said State," being the vacant and unappropriated lands in the alternate sections designated by odd numbers, for six sections in width on each side of the railroad from Burlington, on the Mississippi River, to a point on the Missouri River near the mouth of the Platte River, known as "The B. & M. R. R," said list occupying four pages, and numbered 1, 2, 3, and
165 4; and a paper purporting to be a copy of a certificate of J. M. Edmunds, Commissioner, dated General Land Office, March 14th, 1862, to which is attached the words, "Approved, subject to the conditions and rights above mentioned," purporting to be signed by Caleb B. Smith, Secretary, further dated Department of the Interior, March 21st, 1862; on each and all of which papers and pages I have affixed my signature, by way of attestation, on the right-hand lower corners, are true copies of the

originals transmitted to me and by me deposited for safe keeping in the office of the register of the State land office of the State of Iowa.

In testimony whereof I have hereunto set my hand and caused to be affixed the great seal of the State of Iowa.

{THE GREAT SEAL OF THE STATE OF IOWA.} Done at Des Moines, this 12th day of April, in the year of our Lord one thousand eight hundred and sixty-two, of the Independence of the United States the eighty-sixth, and of this State the sixteenth.

SAMUEL J. KIRKWOOD.

By the Governor:

ELIJAH SELLS, *Secretary of State.*

GENERAL LAND OFFICE, *March* 25, 1862.

I, J. M. Edmunds, Commissioner of the General Land Office, do hereby certify that the annexed, from page 1 to page 5, inclusive, is a true and literal exemplification of the original approved list on file in this office.

{SEAL OF THE U. S. GENERAL LAND OFFICE.} In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

J. M. EDMUNDS,
Commissioner of the General Land Office.

THE BURLINGTON AND MISSOURI RIVER R. R.

Supplemental list of lands in the district of lands subject to sale at Council Bluffs, outside the six and within the fifteen mile limits of the reserve, to satisfy the grant made to the State of Iowa by an act of Congress approved the 12th of May, 1856, entitled "An act making a grant of land to the State of Iowa, in alternate sections, to aid in the construction of certain railroads in said State," being the lands selected by the agent of the governor of the State of Iowa from the lands of the United States, in alternate sections and parts of sections, designated by odd numbers, nearest to the tier of sections within six sections in width on each side of the railroad

166 from Burlington, on the Mississippi River, to a point on the Missouri River near the mouth of the Platte River, and in lieu of the lands in the alternate sections, designated by odd numbers, within said six sections in width, which the United States has legally sold or otherwise appropriated, or to which the rights of pre-emption have attached.

SAMUEL J. KIRKWOOD.

EXHIBIT B.

North of base line and west of the fifth principal meridian, Iowa.—The B. & M. R. R.—Council Bluffs district—Railroad list—Fifteen mile limits.

No.	Parts of sections.	Sec.	T'p.	R'ge.	Acres.
1	NW	1	69	34	150.09
2	E. h. SW. and SW. SW	9	"	"	120
3	E. h. SW	15	"	"	80
4	NW	17	"	"	160
5	SW	71	"	"	160
6	NW. and W. h. SE	23	"	"	240
7	E. h. NW	25	"	"	80
8	NE	27	"	"	160
9	NE. NW	29	"	"	40
10	NE. SE	1	73	"	40
11	SE. SE	15	"	"	40
12	SW. NW	23	"	"	40
13	NE. and N. h. NW	27	"	"	240
14	S. h. SW	29	"	"	80
15	W. h. SE. and NE. NE	31	"	"	120
16	W. h. E. h.	3	68	39	62.71
17	NE	11	69	"	160
18	NW. and N. h. NE	13	"	"	240
19	SW. NE. and SW. SW	25	"	"	80
20	NE. NE	27	"	"	40
21	S. h. NE. and NE. NE	35	"	"	120
22	E. h. SE	35	"	"	80
23	E h. NW. and W. h. SW	7	68	36	183.10
24	E. h. NW. and S. h. NW. and W. h. SE	9	"	"	240
25	NE. SE. and NE. SW	9	"	"	80
26	SW. and SW. NE. and SE. NW	1	69	"	240
27	W. h. SE. and SE. SE	1	"	"	120
28	E. h. sec	5	"	"	321
29	W. h sec	9	"	"	320
30	W. h NE. and SE. NE. and W. h. SE	23	"	"	200
31	NE SE	25	"	"	40
32	SE. and SE. NE	27	"	"	200
33	SE. and W. h. NE. and NE. NE	29	70	"	200
34	E h. NW. and S. h. SW	33	"	"	160
35	NE	7	73	"	160
36	SW	9	63	37	160
37	SW	15	"	"	160
					3,377.40

SAMUEL J. KIRKWOOD.

167 EXHIBIT B—Continued.

North of base line and west of the 5th principal meridian, Iowa.—The B. & M. R. R. list—Council Bluffs district—Fifteen mile limits.

No.	Parts of sections.	Sec.	T'p.	R'ge.	Acres.
38	E. h. sec. and NW	17	69	37	480
39	NE. and E. h. NW. and SW. NW	19	"	"	281. 35
40	NW	21	"	"	160
41	NW	29	"	"	160
42	W. h. SE. and E. h. SW	25	70	"	160
43	W. h. SE. and NE. SW	29	73	"	120
44	SE. SE	7	74	"	40
45	N. h. NW. and SW. SW	17	"	"	120
46	NW. NE	13	73	38	40
47	SW. NW. and NW. SW	11	74	"	80
48	Whole of	5	69	39	607. 94
49	Whole of	7	"	"	630. 64
50	E. h. NW. and SW. NW	1	70	"	119. 10
51	E. h. SW. and SW. SW	1	"	"	120
52	NW	13	"	"	160
53	N. h. SW	5	69	40	80
54	S. h. SW. and SE. NE	"	"	"	120
55	W. h. SE. and NE. SE	"	"	"	120
56	N. h. NE. and N. h. NW. and SW. NW	7	"	"	207. 53
57	SE. and E. h. NE	1	70	"	239. 94
58	W. h. sec. and SW. SE	13	"	"	360
59	NE. and W. h. SE. and E. h. SW	23	"	"	320
60	SE. NE. and SE. SW	27	"	"	240
61	SE. and S. h. NE. and SE. SW	33	"	"	280
62	W. h. SW. and W. h. NW	33	"	"	160
63	SW. and E. h. NW	1	73	"	235. 23
64	W. h. NW. and W. h. SW	3	"	"	155. 85
65	Whole of	9	"	"	640
66	S. h. SE. and NE. SE	11	"	"	120
67	S. h. sec. and NW. and S. h. NE	15	"	"	560
68	E. h. SW. and W. h. SE. and SE. SE	17	"	"	200
69	N. h. sec	21	"	"	320
70	SE. and W. h. NE. and SE. NE	15	74	"	280
71	E. h. NW. and SW. NW	21	"	"	120
72	SW. NE. and SE	27	"	"	200
73	E. h. SE	33	"	"	80
74	Whole of	5	69	"	626. 80
					8, 944. 38

SAMUEL J. KIRKWOOD.

168 EXHIBIT B—Continued.

North of the base line and west of the fifth principal meridian, Iowa—The B. & M. R. R.—Railroad list—Council Bluffs district—Fifteen mile limits.

No.	Parts of sections.	Sec.	T'p.	R'ge.	Acres.
75	SE. NE. and NE. SE	7	69	41	80
76	S. h. sec. and E. h. NE	9	"	"	400
77	SW. NE. and SW. NW	9	"	"	80
78	S. h. sec. and S. h. NE. and S. h. NW	9	"	"	480
79	NW. and W. h. SW	3	70	"	234. 83
80	S. h. sec. and N. h. NW. and NE	5	"	"	541. 48
81	S. h NW	5	"	"	80
82	E. h. NE. and E. h. SE	7	"	"	160
83	Whole of	9	"	"	640
84	NE. NW	15	"	"	40
85	E. h. sec. and NW	17	"	"	480
86	W. h. SW. and NE. SW	17	"	"	120
87	E. h. SE. and SW. SE	19	"	"	120
88	E. h. sec	21	"	"	320
89	W. h. NW	27	"	"	80
90	W. h. sec. and W. h. NE. q. and W. h. SE	29	"	"	480
91	E. h. NE. and E. h. SE. and SW. SE	31	"	"	200
92	S. h. SE. and S. h. SW. and NW. SW	33	"	"	200
93	W. h. SE	27	71	"	80
94	SE. SE	31	"	"	40
95	E. h. sec. and SW	33	"	"	480
96	E h. NW. and NW. NW	33	"	"	125
97	SE. SE	13	73	"	40
98	W. h. NW	15	74	"	80
99	NE. SE	21	"	"	40
100	E. h. SE. and SW. SE	29	"	"	120
101	NE. SW. and N. h. SE	1	73	44	390
102	NE. and E. h SW	5	"	"	234
103	E. h. NE. and E. h. SE	11	"	"	160
104	NW. NW	13	"	"	40
105	W. h. NW	33	74	42	80
106	W. h. NE. and E. h NW	3	69	43	145. 42
107	E. h. sec. and E h. SW. and SE. NW	5	"	"	429. 30
108	NE. SW. and SW. SW	1	70	"	80
109	W. h. sec	3	"	"	310. 45
110	Lots 1. 3, and 4 and NE. NE	5	"	"	182. 45
111	E. h. SE. and SW. SE	5	"	"	120
					7, 908. 00

SAM'L J. KIRKWOOD.

169 EXHIBIT B—Continued.

North of base line and west of the 5th principal meridian, Iowa—The B. & M. R. R. list—Council Bluffs district—Fifteen mile limits.

No.	Parts of sections.	Sec.	T'p.	R'ge.	Acres.
112	S. h. sec. and W. h. NW. and SE. NW	9	70	43	440
113	E. h. NE. and SW. NE	"	"	"	120
114	W. h. sec	11	"	"	320
115	S. h. sec. and S. h. NE. and S. h. NW	15	"	"	480
116	NW. SE. and SW. NE	17	"	"	360
117	E. h. SW. and NW. SW	"	"	"	120
118	Lot 3 in	19	"	"	44. 80
119	NW. q. and SE. q. and E. h. NE	21	"	"	400
120	N. h. sec. and S. h SE. and S. h. SW	27	"	"	480
121	E. h. sec. and W. h. NW. and W. h. SW	29	"	"	480
122	S. h. sec. and E. h. NE. and NE. NW	31	"	"	399. 53
123	W. h. sec. and SE. and W. h. NE	33	"	"	360
124	NW. and W. h. SW. and NW. NE	21	71	"	280
125	E h sec	29	"	"	320
126	SE. and S. h. NE. and NW. NE	33	"	"	280
127	E h. SW. and SE. NW	"	"	"	120
128	W. h. SW. and SE. SW	35	"	"	120
129	SW. SE	"	"	"	40
130	E. h. SE. and NW. SE	1	73	"	120
131	E. h. NW. and E. h. SW	17	"	"	160
132	E. h. NE. and NW. NE	13	"	44	120
133	NE. SE	"	"	"	40
					5, 804. 33

Making a total of 28.034 acres and eleven-hundredth' of an acre.

GENERAL LAND OFFICE, *March* 14, 1862.

I, J. M. Edmunds, Commissioner of the General Land Office, do hereby certify the foregoing, on pages 1 to 4 inclusive, is a true and correct list of the tracts of land selected by the agent of State of Iowa outside of the six and within the fifteen mile limits under an act of Congress approved the 15th of May, 1856, entitled "An act making a grant of lands to the State of Iowa, in alternate sections, to aid in the construction of certain railroads in said State," the said selections being from the lands of the United States, in the alternate sections, designated by odd numbers, most contiguous to the tier of sections within six sections in width on each side of the railroad "from Burlington, on the Mississippi River, to a point on the Missouri River near the mouth of the Platte River," known as "The B. & M. R. R.," and being in lieu of the lands in the alternate sections designated by odd numbers, within said six sections in width on each side of said road, which the United States had legally sold, or to which
170 the right of pre-emption had legally attached prior to the period at which the rights of the State inured under said grant; and they are now submitted for the approval of the Secretary of the Interior, in accordance with the requirements of said act of the 15th of May, 1856, subject to all its conditions, and to any valid interfering rights which may exist to any of the tracts embraced in the foregoing list.

In testimony whereof I have hereunto subscribed my name and caused the seal of the General Land Office to be affixed, at the city of Washington, on the day and year first hereinabove written.

[SEAL.]

J. M. EDMUNDS,
Commissioner.

DEPARTMENT OF THE INTERIOR,
March 12*st*, 1862.

Approved, subject to the conditions and rights above mentioned.

CALEB B. SMITH,
Secretary.

SAMUEL J. KIRKWOOD.

UNITED STATES OF AMERICA,
State of Iowa, ss:

Know ye, that I, Samuel J. Kirkwood, governor of the State of Iowa and keeper of the great seal thereof, do hereby certify that the foregoing papers, that is to say, a paper purporting to be a certificate of J. M. Edmunds, Commissioner of the General Land Office, dated General Land Office, March 25th, 1862; also, a paper purporting to be a supplemental list of lands in the district of lands subject to sale at Council Bluffs outside of the six and within the fifteen mile limits of the reserve to satisfy the grant made to the State of Iowa by an act of Congress approved the 15th of May, 1856, entitled "An act making a grant of lands to the State of Iowa, in alternate sections, to aid in the construction of certain railroads in said State," being the lands selected by the agent of the governor of the State of Iowa, from the land of the United States in alternate sections and parts of sections designated by odd numbers nearest to the tier of sections within six sections in width on each side of the railroad from Burlington, on the Mississippi River, to a point on the Missouri River near the mouth of the Platte River, and in lieu of the lands in the alternate sections designated by odd numbers within said six sections in

width, which the United States had legally sold or otherwise appropriated, or to which the rights of pre-emption have attached; said list occupying four pages, and numbered 1, 2, 3, and 4, and a paper purporting to be copy of a certificate of J. M. Edmunds, Commissioner, dated Gen-
171 eral Land Office, March 14th, 1862, to which is attached the words "Approved, subject to the conditions and rights above mentioned," purporting to be signed by Caleb B. Smith, Secretary, and dated Department of the Interior, March 21st, 1862, on each and all of which papers and pages I have affixed my signature, by way of attestation, on the right hand lower corners, are true copies of the originals transmitted to me and by me deposited for safe keeping in the office of the register of the State land office of the State of Iowa.

In testimony whereof I have hereunto set my hand and caused to be affixed the great seal of the State of Iowa.

{THE GREAT SEAL OF THE STATE OF IOWA.} Done at Des Moines, this 12th day of April, in the year of our Lord one thousand eight hundred and sixty-two, of the Independence of the United States the eighty-sixth, and of this State the sixteenth.

SAMUEL J. KIRKWOOD.

By the governor:
ELIJAH SELLS,
Secretary of State.

EXHIBIT C.

North of base line and west of the fifth principal meridian, Iowa—The B. & M. R. R.—Council Bluffs district—Railroad list—Six mile limits.

No.	Parts of sections.	Sec.	T'p.	R'ge.	Acres.
1	N. fr. h. NW	5	71	34	75.21
2	NW. NW	5	"	"	40
3	W. fr. h. and SW. SW	7	70	35	69.78
4	SE	17	"	"	160
5	SW. NE	15	71	"	40
6	SE. NW	"	"	"	40
7	W. h. NE	17	70	36	80
8	NW. fr. q	19	71	37	153.48
9	NE. SE	20	"	"	40
10	W. h. SE	"	"	"	80
11	SW. NE	"	"	38	40
12	SE. NW	"	"	"	40
13	NW. SE	"	"	"	40
14	NE. SW	"	"	"	40
15	W. h. sec	29	72	39	320
16	SE	31	"	"	160
17	SW	17	"	43	160
					1,578.47

Making in all a total of $1,578.47 acres.

SAMUEL J. KIRKWOOD.

172 GENERAL LAND OFFICE, *February 26th*, 1863.

I, J. M. Edmunds, Commissioner of the General Land Office, do hereby certify that the foregoing, on page 1, is a true and correct list of the tracts of land within the six mile limits granted to the State of Iowa, by the act of Congress approved the 15th of May, 1856, entitled "An act making a grant of lands to the State of Iowa, in alternate sections, to aid in the construction of certain railroads in said State, being the vacant and unappropriated lands in the alternate sections designated by odd numbers, for six sections in width on each side of the railroad from Burlington, on the

Mississippi River, to a point on the Missouri River near the mouth of the Platte River," known as "The B. & M. R. R., within the State of Iowa," and they are now submitted for the approval of the Secretary of the Interior, in accordance with the requirements of said act of 15th of May, 1856, subject to all its conditions, and to any valid interfering rights which may exist to any of the tracts embraced in the foregoing list.

In testimony whereof I have hereunto subscribed my name, and caused the seal of the General Land Office to be affixed, at the city of Washington, on the day and year first herein above written.

{SEAL OF THE GENERAL LAND OFFICE OF THE UNITED STATES.} J. M. EDMUNDS.
Commissioner.

DEPARTMENT OF THE INTERIOR, *April 7th*, 1863.

Approved, subject to the conditions and rights above mentioned.

J. P. USHER,
Secretary.

GENERAL LAND OFFICE, *April* 11, 1863.

I, J. M. Edmunds, Commissioner of the General Land Office, do hereby certify that the annexed, from page 1 to page 2 inclusive, is a true and literal exemplification of the original approved list on file in this office.

In testimony whereof I have hereunto subscribed my name, and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

{SEAL OF THE U. S. GENERAL LAND OFFICE.} J. M. EDMUNDS,
Commissioner of the General Land Office.

THE BURLINGTON AND MISSOURI RIVER R. R.

Supplemental list of lands in the district of lands subject to
173 sale at Council Bluffs, within the six mile limits, granted to the State of Iowa by an act of Congress approved the 15th of May, 1856, entitled "An act making a grant of land to the State of Iowa, in alternate sections, to aid in the construction of certain railroads in said State," being the vacant and unappropriated lands in alternate sections, designated by odd numbers, for six sections in width on each side of the railroad from Burlington, on the Mississippi River, to a point on the Missouri River near the mouth of the Platte River, known as the B. & M. R. R.

GENERAL LAND OFFICE, *April 11th*, 1863.

I, J. M. Edmunds, Commissioner of the General Land Office, do hereby certify that the annexed, from pages 1 to three inclusive, is a true and literal exemplification from the original on file in this office.

In testimony whereof I have hereunto subscribed my name, and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

{SEAL OF THE UNITED STATES GENERAL LAND OFFICE.} J. M. EDMUNDS,
Commissioner Gen. Land Office.

THE BURLINGTON & MISSOURI RIVER RAILROAD.

Supplemental list of lands in the district of lands subject to sale at Council Bluffs, outside of the six and within the fifteen mile limits of the reserve, to satisfy the grant made to the State of Iowa by the act of Con-

gress, approved the 15th of May, 1856, entitled "An act making a grant of lands to the State of Iowa, in alternate sections, to aid in the construction of certain railroads in the State, being the lands selected by the agent of the governor of the State of Iowa, from the lands of the United States, in alternate and parts of sections, within six sections in width on each side of the railroad, from Burlington, on the Mississippi River, to a point on the Missouri River near the mouth of the Platte River," and in lieu of the lands in the alternate sections, designated by odd numbers, within said six sections in width, which the United States had legally sold or otherwise appropriated, or to which the rights of pre-emption have attached.

174 EXHIBIT D.

North of base line and west of the 5th principal meridian, Iowa—The B. & M. R. R. list—Council Bluffs district—Fifteen mile limits.

No.	Parts of sections.	Sec.	T'p.	R'ge.	Acres.
1	NE. fr.	5	69	34	159.96
2	E. h. NW	7	"	"	80
3	W. h. NE	"	"	"	80
4	SW. NW	9	"	"	40
5	NW. SW	"	"	"	40
6	SW	13	"	"	160
7	NE	17	"	"	160
8	NE	23	"	"	160
9	SW. NE	11	70	"	40
10	NE. SE	"	"	"	40
11	W. h. SE	"	"	"	80
12	W. h. SE	1	69	35	80
13	E. h. SW	"	"	"	80
14	SE	11	"	"	160
15	NE	33	"	"	160
16	NW. NW	11	73	"	40
17	N. h. SW	"	"	"	80
18	NE. fr.	1	"	36	149.98
19	NE. SE	3	"	"	40
20	SE	5	"	"	160
21	NE	9	"	"	160
22	NE	33	74	"	160
23	SE	"	"	"	160
24	SE	7	69	37	160
25	NE	11	"	"	160
26	SE	15	"	"	160
27	NW. fr. NW	19	"	"	41.02
28	E. h. SW	5	70	"	80
29	SW. SW	"	"	"	40
30	E. h. NE. and SW. NE.	7	"	"	120
31	E. h. SW	"	"	"	80
32	SW. fr. SW	"	"	"	35.43
33	E. h. NW	27	73	"	80
34	NE. SW	"	"	"	40
35	W. h. SE	11	69	38	80
36	E. h. SW	"	"	"	80
	Am't forward				3,626.39
175					
	Am't bro't frd.				3,626.39
37	SE. SE	13	69	38	40
38	E. h. NE	15	"	"	80
39	N. h. NE	9	70	"	80
40	N. h. NW	"	"	"	80
41	E. h. NE	35	"	"	80
42	W. h. sec	33	71	"	320
43	NE. SE	7	70	39	40
44	NE. SE	17	73	40	40
45	W. h. NE	7	"	41	80
46	N. fr. h. NW	"	"	"	72.12
47	W. h. SE	11	"	"	80
48	SE. SW	"	"	"	20
49	NE. NE	"	70	43	40
51	W. h. NW. and SE. NW	13	"	"	120
	NE. SW	"	"	"	40
					4,860.51

Making a total of 4,860.51.

GENERAL LAND OFFICE, *February 26th*, 1862.

I, J. M. Edmunds, Commissioner of the General Land Office, do hereby certify the foregoing, on pages 1 and 2 inclusive, is a true and correct list of the tracts of land selected by the agent of State of Iowa outside of the six and within the fifteen mile limits under an act of Congress approved the 15th of May, 1856, entitled "An act making a grant of lands to the State of Iowa, in alternate sections, to aid in the construction of certain railroads in said State," the said selections being from the lands of the United States, in the alternate sections, designated by odd numbers, most contiguous to the tier of sections within six sections in width on each side of the railroad "from Burlington, on the Mississippi River, to a point on the Missouri River near the mouth of the Platte River," known as "The B. & M. R. R.," and being in lieu of the lands in the alternate sections designated by odd numbers, within said six sections in width on each side of said road, which the United States had legally sold, or to which the right of pre-emption had legally attached prior to the period at which the rights of the State inured under said grant; and they are now submitted for the approval of Secretary of the Interior, in accordance with
176 the requirements of said act of the 15th of May, 1856, subject to all its conditions, and to any valid interfering rights which may exist to any of the tracts embraced in the foregoing list.

In testimony whereof I have hereunto subscribed my name, and caused the seal of the General Land Office to be affixed, at the city of Washington, on the day and year first herein above written.

{SEAL OF THE GENERAL LAND OF THE UNITED STATES.}

J. M. EDMUNDS,
Commissioner.

DEPARTMENT OF THE INTERIOR,
April 7th 1863.

Approved, subject to the conditions and rights above mentioned.

J. P. UPSHUR, *Secretary.*

Exhibit , being plat of road referred to in the foregoing answer as filed in the office of the Secretary of State March 27th, 1857, for copy of which see abstract pp. .

(For copy of decree in former action see abstract, p. 14.)

XVIII. Pl'ff next read in evidence the opinion of the supreme court of Iowa, as found in 22 Iowa, pp. 91 to 130, affirming the judgment of the district court, and reference is here made to said report without reprinting the same in this place; also an authenticated copy of the judgment of said supreme court in said cause, at June term, 1867 (transcript, pp. 656 and 885), which judgment (omitting the heading and style) is as follows:

"June term, 1867, appeal from Mills County.

"At the argument term, held at Davenport in April last, the court ordered that this cause be affirmed, and filed their written opinion. It is now considered by the court that judgment of the court below be, and the same hereby is, affirmed; that a writ of procedendo issue accordingly, and that the appellee have and recover of and from the appellant

the costs in this behalf laid out and expended at this court, taxed at $19.30, and that execution issue therefor."

(Duly authenticated.)

XIX. Pl'ff offered in evidence an authenticated copy of the docket entry in said cause in the Supreme Court of the United States, taken to the Supreme Court of the United States on writ of error by the
177 B. & M. R. R. Co. as pl'ff in error, and the docket entries of the Supreme Court of the United States in the case of the B. & M. R. R. Co. vs. Fremont County, Iowa, pending there on writ of error from the supreme courf of the State of Iowa, these cases being numbered in that court 39 and 40, respectively (transcript, pp. 656 and 874).

D. Rorer 39 J. Ewing	1867. Dec. 7	The B. & M. R. R. Co., pl'ff in error. Mills County, Iowa.	Iowa supreme court '69. Oct. 25th, continued. '70, Feb. 2d, ordered by the court to be submitted on the record, to abide the decision in No. 40. '70, Feb 7th, adjudged to be affirmed with costs.	Affirmed with costs, 7th Feb., '70.
D. Rorer 40 J. A. Harvey	1867. Dec. 7	The B. & M. R. R. Co., pl'ff in error. Fremont Co., Iowa.	Iowa supreme court, '69, Oct. 25th, stipulation of counsel to submit filed. '69, Nov. 3d, submitted. '70, Feb. 7th, adjudged to be affirmed with costs.	Affirmed with costs, 7th Feb., '70.

True copy of docket entries in cases of B. & M. R. Co. vs. Mills County and B. & M. R. R. Co. vs. Fremont County, Nos. 39 and 40, December term, 1869.

[SEAL.]

D. W. MIDDLETON,
Clerk Supreme Court U. S.

XX. Pl'ff next offered an authenticated copy of the opinion of the Supreme Court of the United States in Railroad Company vs. Fremont County, December term, 1869. Reference is here made to 9 Wall., pp. 89–95, for said opinion without reproducing same here (transcript, 657, and 880).

And also the judgment of said court in said opinion, as follows (transcript, 657, 876 and 878):

"No. 40, Supreme Court of the United States, December term, 1869. The B. & M. R. Co. *vs.* pl'ff in error, Fremont County, Iowa. In error to the supreme court of the State of Iowa.

178 "This cause came on to be heard on the transcript of the record from the supreme court of the State of Iowa, and was argued by counsel. On consideration whereof it is now here ordered, adjudged, and decreed by this court that the decree of the said supreme court be, and the same is hereby, affirmed, with costs.

"7th February, 1870.

"True copy. Test.

[SEAL.]

"D. W. MIDDLETON,
"*Clerk of the Supreme Court.*"

And at the same time pl'ff offered the authenticated copy of the opinion of the Supreme Court of the United States in the case of the B. & M. R. R. Co., pl'ff in error, vs. Mills County, Iowa, as follows:

"Supreme Court of the United States. No. 39. December term, 1869.

"THE BURLINGTON & MISSOURI RIVER RAILROAD Co., pl'ff in error,
"*vs.*
"MILLS COUNTY.

"In error to the supreme court of the State of Iowa.

"Mr. Justice Nelson delivered the opinion of the court.

"This is a writ of error to the supreme court of the State of Iowa. The pleadings and proofs present the same questions involved in the case of the pl'ffs against Fremont County, and must be disposed of in the same way. The decree of the court below is affirmed.

"True copy. Test.

[L. S.] "D. W. MIDDLETON,
"*Clerk Supreme Court United States.*"

And at the same time pl'ff offered authenticated copy of the judgment of said court in same cause, as follows:

"No. 39. Supreme Court of the United States. December term, 1869. The B. & M. R. R. Co. *vs.* pl'ff in error, Mills County, Iowa. In error to the supreme court of the State of Iowa.

"This cause came on to be heard on the transcript of the record from the supreme court of the State of Iowa, and was argued by counsel. On consideration whereof it is now here ordered, adjudged, and decreed by this court that the decree of the said supreme court in this cause be, and the same is hereby, affirmed with costs.

"7th February, 1870.

"True copy. Test.

[SEAL.] "D. W. MIDDLETON,
"*Clerk of Supreme Court of U. S.*"

179 XXI. T. P. BALLARD, a witness, being sworn, said:

I published the Glenwood Opinion in Mills County, in the year 1871; it was a weekly paper; the proposition for a contract and the resolutions of the board were published 4 weeks before the election. I furnish herewith a copy of the publication (transcript, p. 658. See abstract, p. 21, for copy of publication).

XXII. Pl'ff next offered the deposition of C. E. PERKINS, who testified as follows:

Have been a director in B. & M. R. R. Co. since some time prior to consolidation with C., B. & Q. R. R. Co. till the present time; am also a director of the C., B. & Q. R. R. Co., and have been since the spring of 1875; Alpheus Hardy, L. Tuckerman, J. A. Barnham, J. W. Brooks, J. M. Forbes, N. Thayer, and R. S. Watson, and I think J. F. Joy, are also

directors; the names of the directors of the last-named company on December 31st, 1872, were Erastus Corning, J. C. Green, S. Bartlett, J. W. Brooks, J. A. Barnham, J. N. Dennison, J. M. Forbes, N. Thayer, R. S. Watson, J. F. Joy, C. F. Colton, and J. M. Walker; where the same name appears as a director in both companies, it is in each case the same person; there were nine directors in the first compa'y and twelve in the last.

XXIII. D. M. WHITFIELD recalled, said (transcript, p. 655): I was a member of the board of supervisors of Mills County in the year 1871.

Q. (by Mr. SOLOMON.) State whether or not there was a demand made of the board of supervisors in the year 1871 by any person on behalf of B. & M. R. R. Co. for the $10,000 that they claimed under the supposed proposition for the contract that is in controversy here.

A. Yes; there was, I think.

Q. At what session was that made.

A. I think it was at the June session.

(Counsel for def't objects to this evidence as immaterial.)

Mr. SOLOMON, attorney for pl'ff, stated: We expect to show that a demand was made and that what was said between the officer repre-
180 senting the company and the board at that time was what led to the submission of the contract. We propose to connect that with the submission, to show how it came about.

The objection was sustained by the court, to which ruling the pl'ff at the time excepted.

XXIV. JOSIAH WEARIN, being sworn, said (Transcript p. 667):

In 1871 I paid to D. N. Smith, agent of B. & M. R. R. Co., $500 on account of swamp lands, to wit, SW. ¼ 13, 72, 41; N. ½ NE. ¼ and SW. NE. 23, 72, 41; afterwards I got a deed for this land from the county, but paid no money to the county; I have the deed here, also; and got *and* a quit-claim from the company, of said land, dated February 6th, 1871, to which was appended a release of the land by John M. Forbes and Henry P. Kidder, trustees.

XXV. J. M. POWELL, recalled, said (Transcript, 675,) that he made out Exhibit M to the petition from the original receipts on file in the auditor's office, but that he is now unable to find numbers 14 and 15 in said exhibit, but knows the recitals in said exhibit to be true. (Abstract, p. 26.)

XXVI. E. C. BOSBYSHELL recalled (Transcript, 678), and identified certain papers as the subscriptions guaranteeing right of way, signed by a large number of persons, after return of committee from Burlington in 1868; and at this point pl'ff offered the papers so identified as evidence, as a part of the testimony showing the action of the people at that time, to which offer def'ts objected as immaterial, irrelevant, and incompetent, and thereupon Mr. Solomon, attorney for pl'ff, stated that he proposed to follow the introduction of these papers and show the court that they were signed rapidly and in a hurry, and because it was supposed that they were essential to the getting of the road. The objection was sustained by the court, and to this ruling the pl'ff at the time excepted.

XXVII. Pl'ff next offers in evidence (Transcript, 681) certified copies of the deeds corresponding with Exhibits C, D, E, F, and G, to the petition. (See pp. 15 to 20 this abstract for copies of said deeds.)

181 XXVIII. A. J. RUSSELL, being sworn, said (Transcript, 681):

I have resided in Mills County twenty years; I am a merchant; was a member of the board of supervisors in 1868, when the proposition between the county and the B. & M. R. R. Co. was acted upon; there was at that time some doubt and concern as to whether the railroad would build centrally through Mills County via Glenwood or not, and this had, to a certain extent, an influence inducing the making of that proposition; there were other reasons with it; can't tell what caused the feeling of alarm that existed at the time; it was generally the conversation; I don't know as there was any particular reason only to have the road; there was talk of the road going to Council Bluffs, and talk of its going to Nebraska City; it was not definitely settled where it would go; this feeling existed at the time the committee was appointed to go to Burlington—this feeling of alarm existed at that time; there was doubt, just the same, no further that this was to settle the thing permanently in regard to where the road was to go, and settle the titles to the land, was my understanding of it, and the people were after us to get it fixed; this state of feeling existed from the time the committee was appointed until the proposition was accepted.

Q. (By Mr. SOLOMON.) Do you remember anything that was said by members of the committee on their return from Burlington in regard to what it would be necessary to do to secure the road—what was said to you in your official capacity?

(Objected to by def'ts as incompetent and immaterial. Objection sustained by the court, to which ruling the pl'ff at the time excepted.)

Q. I will read a portion of this proposition to you and then ask you a question in regard to it. "It is also further understood that the foregoing proposition shall not be binding upon the county of Mills unless said railroad company shall complete said road through Mills County via Glenwood, and build a depot at Glenwood, in said county; and in case said railroad company shall fail or neglect to build said railroad through Mills County via Glenwood, and also to build and establish a depot at Glenwood, in said county, then and in that event the said lawsuit shall
182 stand for final hearing in the Supreme Court of the United States the same as if this proposition had never been made." Now I will ask you whether you would have been willing to adopt this proposition without that clause or something equivalent?

(Objected to by def'ts as incompetent and immaterial. Objection sustained by the court, to which ruling pl'ff at the time excepted.)

Cross-examination:

No act of the railroad influenced me as member of the board; there was anxiety, every one was feeling an interest in it; I could not say that this anxiety was not created by any act of the railroad company; I don't know of any act any more than the disposition of the people to believe that the railroad company did not intend to run the road here unless there was some act to induce it; I don't know of any specific act done by the rail-

road company; there was a fear among the people that they might lose the road. After the committee was appointed and authorized to submit this proposition, we, as members of the board, felt relief from the constant importunities of the people who held these lands under the county for some action to be taken to quiet the title to these lands; of my own knowledge I knew of no lines having been run other than the original line of 1856; had heard of such other lines being run at the time of the acceptance of this proposition, in November, 1868; from reports there had been several surveys; I don't know that these influenced my action as a member of the board.

Redirect examination:

It was known to myself and other members of the board that Mr. Hale and Mr. Ewing had prosecuted the case successfully through the State courts; I can't say that that fact imparted confidence in my mind or that of my fellow members; of course we thought we had a pretty good case, but from what attorneys of our town had told us we did not feel sanguine attorneys here, different attorneys said there was a question that we might win the suit and might lose it, although we had been successful thus far; our success up to that time did impart confidence to a cer-
183 tain extent; we considered that the chances were in our favor, but that the decision might be reversed; I knew at the time that the railroad company had originally established their road through Mills County via Glenwood; the report that they were contemplating the construction of the road elsewhere, and the fear induced thereby that we would lose the road had a great deal to do in bringing about this contract or arrangement; the proposition lay from June till November, when the report was brought in and accepted by the board.

Recross-examination:

I don't know that these reports were brought about by the railroad company; there were reports at that time—June, 1868—but who brought them about is a question I can't answer; I don't know who started them, or where they originated; these reports influenced my mind, whether the railroad company did it or not; this was in June, the same time the proposition was made, which was to make sure of the road for one object and to quiet the title for another; the proposition was made by Mills County, and it was left for the railroad company to say whether it would accept or not.

XXVIII. W. G. SUMMERS, being sworn, said (Transcript, 696):

I have lived in Mills County nineteen years; was member of board of supervisors in 1868–'9, and at time committee was sent to Burlington; the object of the committee was, if I understand the thing right, to get the railroad to this point, Glenwood, and to settle an old lawsuit; the original survey was made before I came here; this survey ran centrally though Mills County and struck Glenwood; when I came to the county it was the understanding throughout this county that the road was to strike Glenwood, the county-seat. This expectation continued until about the time that the proposition for a contract was gotten up; at the time the committee was appointed there was considerable fear in the minds of the members of the board that the road would not be built centrally through

Mills County via Glenwood; there was strong talk of the road running to Nebraska City, and some little talk of its running to Council Bluffs,
184 but during our session of the board of supervisors Nebraska City was most talked of; surveys had been talked of both north and south; there was talk by a good many that either of these surveys were easier built than the original survey; I mean to say that there was alarm existing, and that it was these surveys and other matters which caused it to be a matter of doubt that the road would be built on the original line; this alarm and feeling was general among the members of the board; it was one of the topics of the day, with other things; this inducement which the board had in offering to devote these lands in that proposition was to secure the railroad centrally through Mills County; that was my idea; had not the latter clause of that contract been thrown in it would not have voted it; by the latter clause I mean that part providing for railroad via Glenwood; if this had been left out I don't think they would have got the contract; it was a leading consideration in making the proposition to secure the road.

Cross-examination:

I suppose the board had the power to appoint the committee or not; the proposition was the voluntary act of the county; I know of no act that the railroad did directly to bring it about; the county had sold some of the swamp lands, and it was one of the considerations in the minds of the board to make certain these titles; I can say that the people I talked with from our part of the county were opposed to a compromise; I don't know that a singular proposition was made in 1866, and I don't remember of the reading of such a proposition before the board in 1868; it might have been done, but I do not remember it.

XXIX. FIELDEN UTTENBACH, being sworn, said (Transcript, 708):

I have lived in Mills County twenty years; there was one route surveyed running not far from Glenwood, near where the line now runs; this was an early survey; I was a member of the board of supervisors in 1868, and when the proposition for a contract was made there was much said about where the road should run; they did not know where it would go—they wanted to get it right through Glenwood; the company were running two or three different routes, as I understood it, running routes one place and another, but the citizens wanted it through Glen-
185 wood. At the time this committee was appointed we were anxious to have the road come through the central portion of the county, I know I was; I did not know where it would go; there was some doubt about it some way; this was when they were anxious to locate the road somewhere.

Cross-examination:

Right smart of the while I was on the board there was quite a chat about where the road would be; I don't know how the community felt, but I thought that every man in the county thought that we ought to have a railroad through the county-seat, or through the center of the county; I don't know of any act the company did to influence the appointment of the committee; I remember that a good many people were before the board wanting titles and wanting lands—could not tell how many or who;

the whole board acted under the advice of an attorney all the time; we got the best information; we had an attorney to advise all the time, clear through; at the time the proposition was made we had a suit in United States court; what influenced me in my action was this: Our land was held and we could not have it settled; we wanted it to come in for taxes; I did not care who owned it; I thought it would be to our advantage to increase the taxes.

Redirect examination:

I don't say that this (the settlement and taxing of the land) was the whole inducement; the way I understood it was that the citizens wanted the railroad through here, and in settling it there was all the while a proviso that this should be a point; this was one of the inducements; I thought that the nearer the center of the county we got the road the better it would be for the county; that is what they all thought, so far as I heard them express themselves.

Recross-examination:

When I make a settlement I am willing to deal fair and make the best terms I can; I can't say that I would have favored the settlement without the provision for the road in it; it is doubtful whether I would, because I thought we were doing fair enough anyhow.

186 XXX. SAMUEL ALLIS, being sworn, said (Transcript, 728): I have lived in Mills County twenty-one years; lived here when the route of the B. & M. R. R. was located through the center of the county; I was a member of the board in 1868, at the time the committee was appointed to go to Burlington, and afterwards during that year; I don't know particularly what caused the appointment of this committee; some persons who had purchased railroad lands had considerable anxiety, and they wished the board to make some arrangements whereby these citizens would be satisfied, and the people of the county generally benefitted; I remember of different surveys being made north and south, but you could not tell which of these routes they intended to run; I presume there was doubt at time committee was appointed as to where road would run; I recollect some saying if we did not use our influence the railroad company might run around us and leave Mills County in the cold; there might have been alarm in the public mind, and in the mind of the board, on that subject—I presume there was; our object in sending the committee was to get the road centrally through the county; the people seemed unsettled in their minds, and in doubt where the road would run, and they wanted an understanding in some way, and settlement made, and we appointed the committee to confer with the railroad company and make some arrangements.

Cross-examination:

One of the principal reasons for making the proposition to the railroad company was to prevent loss of lands; the proposition was made, I think, independent of any act of the railroad company.

XXXI. Pl'ff next read in evidence the letter of the acting Commissioner of the General Land Office, dated Aug. 20th, 1856, to the secretary of state of Iowa, to be read in connection with the plat of the location of the route filed March 27th, 1857, and as explanatory of the reason that led to the filing of that plat (Transcript, pp. 735 and 800):

187 GENERAL LAND OFFICE, *August 20th*, 1856.

GEORGE W. MCCLEARY,
Secretary of the State of Iowa, at Iowa City:

SIR: I have the honor to acknowledge the receipt of your communication of the 12th inst., enclosing a certified copy of the act of the State legislature, approved on the 14th of July, 1856, to accept the grant, and to carry into execution the trust conferred upon the State of Iowa by the act of Congress making the grant of lands for railroads, approved May 15th, 1856, which has been placed on the regular files in this office. It is observed that the 6th section of the law directs that it shall be the duty of the governor, after fixing his official signature, to file such map in the department having control of the public lands in Washington, *such location being considered final only so far as to fix the limit and boundary within which lands may be selected.* The part which I have italicised appears to me to conflict directly with the act of Congress which contemplates that the route shall be "definitely fixed," and it is proper that I should through you, in this early stage of the business, call the attention of the State executive and the companies to the matter, and announce the opinion of this office so far as to prevent unnecessary delay. A route merely for fixing the limits of the grant will not be acted upon; it must be something real and fixed, the grant cannot be in one place and the actual route in another; although slight variations of the line, such as are unavoidable in the progress of construction of such works would be admissible, any material changes of the route would be considered acting in bad faith with the United States, and cannot be tolerated, for such would be a clear violation of the law which proposes an indemnity to the United States for the lands granted away by the enhanced value of the alternate sections remaining to the government near the route of the road. The route of the road must therefore be first definitely fixed as required by the law of Congress or no title vests.

In the above view it is expected that the certificate of the governor on the maps returned to this department will set forth that such maps delineate the routes as "definitely fixed," that is, as final locations, before they can receive our action.

I am, very respectfully, your obedient servant,

JOS. S. WILSON,
Acting Commissioner.

Plaintiff rests in chief.

188 *Defendants' evidence.*

After pl'ffs had rested in chief, the def'ts, subject to objections made at the taking and the further written objections filed after the taking and before the trial, which latter objections are annexed to the original depositions in each case, introduced the depositions of the following persons, to wit: C. W. Spalding, C. E. Perkins, W. W. Peete, A. E. Touzalin, J. M. Walker, Henry Strong, H. A. Copeland, D. N. Smith, David Rorer, J. M. Forbes, W. H. Taft, H. C. Watkins, B. F. Buffington, Bennett Creech, It being expressly agreed between the parties in open court, at and during the trial, that the court was to consider and rule on said objections on the final hearing, and to indicate such ruling by indorsement thereon.

I. Deposition of C. W. SPAULDING (Transcript, 906):

I am now secretary of the land department of the C. B. & Q. R. R. Co.; was formerly secretary of the B. & M. R. R. Co. land department; I was local agent of the B. & M. R. R. Co. at Glenwood, in 1870; I prepared the company's tax lists for 1870–'1–'2–'3; J. M. King superintended the payment of the taxes for 1870, and I superintended the payments for the other years.

Q. 5. Have you lists of land on which the B. & M. R. R. Co. paid taxes for either or all of those years? If you have, produce the same, that it may be attached to your deposition as an exhibit.

(To this question pl'ff, at the taking, objected as incompetent, and on the trial pl'ff objected to question and answer as incompetent, and because the tax receipts therein referred to were not the act of the pl'ff or of any agent who had power to bind the pl'ff in the premises.

No ruling announced by the district court.)

A. 5. I have for each of these years, 1870–'1–'2–'3, and here annex the same as Exhibit A.

Q. 7. To whom was the tax money paid?

(Same objection as to No. 5. No ruling.)

A. To B. C. Atkins, treasurer of Mills County.

189 Q. 12. What does this list, Exhibit A, show?

(Same objection as to No. 5. No ruling.)

A. It is a list of the lands in controversy, showing the section, township, range, acres, taxes paid for 1870, amount and date; taxes paid for 1871, amount and date; taxes paid for 1872, amount and date, and taxes paid for 1873, amount and date; it shows the amount for each of those years, 1870–'1–'2–'3, and the grand total for those years, amounting to $4,125.36; for 1870, $912.04; for 1871, $1,230.65; for 1872, $1,063.20; for 1873, $919.47. It also contains 160 acres, described as follows: W. ½ of SE. sec. 7, Tp. 72, R. 40, and W. ½ of SW. ¼ sec. 1, Tp. 71, R. 43, which were by mistake included in the deeds by Mills Co. to the railroad co., but which belonged to the clear list, and not in controversy. Exhibit A was made by me and compared with the original tax receipts and is correct.

Q. 14. Examine Exhibit A to answer of C., B. & Q. R. R. Co., and state what it is, and whether it is correct.

Q. 14. Examine Exhibit A to answer of C. & Q. R. R. Co., and state what it is and whether it is correct.

(To which p'ff, at the taking and on the hearing, objected for incompetency, irrelevancy, and immateriality. No ruling.)

A. It is a correct list of the lands sold by the B. & M. R. R. Co., prior to December 31st, 1872.

(Same objections as to No. 14. No ruling.)

A. It is a correct list of the lands in controversy, which have been sold by the B. & M. R. R. Co. since December 31st, 1872, and warranted.

The railroad company conveyed certain lands to Mills County.

Q. 17. Have you a list of the lands so sold (to Mills County); if so, produce the same that it may be attached as an exhibit?

(Same objection as to No. 14. No ruling.)

A. I have; which I attach as Exhibit B.

Q. 18. Why were these lands so deeded to Mills County?

(Same objection as to No. 14. No ruling.)

A. In pursuance of the compromise of 1868, and in consideration of other deeds made by Mills County to the railroad company.

190 Q. 20. You speak of a compromise of 1868; what compromise was that?

(Same objection as to No. 14. No ruling.)

A. Between the B. & M. R. R. Co. and the county of Mills. It was the compromise of a lawsuit instituted by Mills County vs. B. & M. R. R. Co. to recover of the railroad company the swamp lands in Mills County. I have seen the contract by which the suit was compromised. Exhibit C to answer of C., B. & Q. R. R. Co. is a correct copy thereof; when blanks occur in Exhibit A to this deposition the taxes are paid by the parties to whom we sold.

Q. 24. Take this paper (here the witness is handed the paper marked Exhibit C to this deposition) and state what it is.

(Same objection as to No. 14. No ruling.)

A. It is a list of lands which were deeded to individuals holding some claims thereon from Mills County, in pursuance of the compromise 1868, by the railroad company, Denison or Russell; I make it a part of my deposition; Denison held tax deeds and Russell tax certificates, all controlled by railroad company, and deeds were made in pursuance of an agreement between railroad company and agent of the county, and the consideration received by the railroad company was a return of principal tax paid, with 10 per cent. interest and 5 per cent. penalty.

Q. 29. Examine this list (Exhibit D to this deposition) and state what it is.

(Same objections as to No. 14. No ruling.)

A. It is a list of lands which had been sold by Mills County prior to the compromise, and upon which the purchasers paid the purchase money to the railroad company in compliance with the contract. These lands were conveyed by the railroad company to Mills County, and are included in Exhibit B to this deposition; the lands were ascertained by Wm. Hale and H. C. Watkins, a committee of the board, and D. N. Smith and H. A. Copeland, agents of the railroad company; and these lands described in Exhibit D were deeded to Mills County for the benefit of bona fide pre-emptors.

191 Q. 34. Examine this list (Exhibit E attached hereto) and state what it contains.

(Same objections as to No. 14. No ruling.)

A. It contains a list of lands in controversy on which Denison held tax deeds or Russell tax certificates, which have been quitclaimed to persons claiming them under Mills County, in pursuance of the compromise.

Cross-examination:

I know from an examination of the duplicate contracts on file that the lands in Exhibit B to the answer to the C., B. & Q. R. R. Co. have been sold. I have annexed an exhibit marked F, showing that list in full, giving the date of sale, description of land sold, the amount of the contract price for each sale, the party to whom the sale was made, the amount of money paid down and received by the railroad company, the terms of payment for the balance in each case, and how much has been paid to date; I know that the matters set forth in Exhibit A to answer of C., B.

& Q. R. R. Co. are correct, from an examination of duplicate contracts on file in this office; I attach as Exhibit G a list of the lands which were so sold prior to Dec. 31, 1872, showing the date of sale of each tract, a description of the land sold, the party to whom sold, the purchase money or contract price, the amount paid down, the terms of payment for the balance, and the amount already paid; the duplicate contracts above referred to were of the same general character, but of different dates, and obligated the company to convey on payment of purchase price; I do not mean to be understood as swearing in answers in chief that the compromise of the lawsuit was the only object of the contract spoken of; that was not the only object; as I understood it, it was to secure a railroad through Mills County via Glenwood; also, I know that said contract provided specially that in case said railroad company should fail to build its road through Mills County via Glenwood, and also build and establish a depot at Glenwood, then and in that event the lawsuit should stand for final hearing in the supreme court the same as if that contract had not been made, and I do not mean to be understood
192 as swearing that the object of the contract was anything other than was expressed by its terms; I have annexed as Exhibit J a true copy of the contract to which I refer. (For this copy see Ab. 21–'3.) Exhibit L, hereto annexed, shows the swamp selections quitclaimed by the B. & M. R. R. Co. in pursuance with the compromise for the preemptors of purchasers on which the B. & M. R. R. Co. received the purchase money.

Redirect examination:

Exhibit M, hereto annexed, is a list of swamp selections in controversy on which the B. & M. R. R. Co. hold tax titles or certificate of tax sale.

EXHIBIT A.

Statement showing taxes paid by the B. & M. on lands embraced in suit with Mills County, entitled Mills County vs. B. & M. R. R. Co. and C. B. & Q R. R. Co., et al.

Part of section.	S.	T.	R.	Acres.	Taxes paid for 1870. Am't.	Date.	Taxes paid for 1871. Am't.	Date.	Taxes paid for 1872. Am't.	Date.	Taxes paid for 1873. Am't.	Date.
NE. NE	5	72	40	26.44	$2 11	Feb. 24, '71	$3 85	Sept. 30, '72				
NW. NE	"	"	"	26.68			3 85	"				
SW. NE	"	"	"	40			5 91	"				
NE. NW	"	"	"	26.80	2 16	Feb. 24, '71	3 04	Feb. 29, '72	$3 10	Feb. 22, '73		
SE. NW	"	"	"	40	3 80	"	5 10	J. N. D. "	4 59	"	$2 96	Feb. 16, '24
SW. SW	"	"	"	"	3 80	"	5 10	J. N. D. "	4 60	"	2 96	"
SE. NW	6	"	"	"	3 80	"	5 10	"	4 60	"	2 96	"
NE. SW	"	"	"	37.04	3 80	"	4 84	"	4 32	"	2 79	"
NW. SW	"	"	"	37.64	3 80	"	5 10	"	4 60	"	2 96	"
SW. SW	"	"	"	40	3 80	"	5 10	"	4 37	"	2 96	"
SE. SW	"	"	"	"	3 20	"	5 10	"	4 37	"	2 96	"
SW. SE	"	"	"	"	3 20	"	5 10	"				
SE. SE	7	"	"	"							Deeded	
NE. NE	"	"	"	"	3 20	Feb. 24, '71	Deeded	April 12, '71	Deeded		"	
NE. NW	"	"	"	38.32	3 20	"	"	"	"		2 88	Feb. 16, '73.
NW. NW	"	"	"	39.09	3 12	"	4 97	Feb. 29, '72	4 50	Feb. 22, '72	2 96	"
SW. NW	"	"	"	40	3 20	"	5 10	"	4 60	"	Deeded	
SE. NW	"	"	"	39.85	3 20	"	Deeded	April 12, '71	Deeded		"	
NW. SW	"	"	"	40.62	3 20	"	"	"	"		2 96	Feb. 16, '74.
SW. SW	"	"	"	40	3 20	"	5 10	Feb. 29, '72	4 60	Feb. 22, '73	2 96	"
NE. SE	"	"	"	"	3 20	"	5 10	"	4 60	"	2 96	"
SE. SE	8	"	"	"	3 20	"	5 10	"	4 60	"	2 96	"
NE. SW	"	"	"	"	3 20	"	5 10	"	4 60	"	2 96	"
NW. SW	"	"	"	"	3 20	"	5 10	"	4 60	"	2 96	"
SW. SW	"	"	"	"	3 20	"	5 10	"	4 60	"		
SE. SW	17	"	"	"	3 80	"	5 10	"				
NE. NE	17	72	40	40	3 80	Feb 24, '71	5 10	Feb. 29, '72	4 60	Feb. 22, '73	2 96	Feb. 16, '74.
194 SE. NE	18	"	"	"	3 20	"	5 10	"	4 60	"	2 96	"
NE. NE	"	"	"	"	3 20	"	5 10	"	4 60	"	2 96	
NW. NE	"	"	"	"	3 20	"	5 10	"	4 60	"	2 96	
SW. NE	"	"	"	"	3 20	"	5 10	"	4 60	Feb. 22, '73	2 96	Feb. 16, '74.
SE. NE	"	"	"	"	3 20	Feb. 24, '74	5 10	"	4 60	"	2 96	"
NE. SE	"	"	"	"	3 20	"	5 10	"	4 60	"	2 96	"
NW. SE	"	"	"	"	3 20	"	5 10	"	4 60	"	2 96	"
SW. SE	"	"	"	"	3 20	"	5 10	"	4 60	"	2 96	"
SE. SE	"	"	"	"	3 20	"	5 10	"	4 60	"	2 96	"
NE. NE	19	"	"	"	3 20	"	5 10	"	4 60	"	2 96	"
NW. NE	"	"	"	"								

EXHIBIT A.—Continued.

Part of section.	S.	T.	R.	Acres.	Taxes paid for 1870.		Taxes paid for 1871.		Taxes paid for 1872.		Taxes paid for 1873.	
					Am't.	Date.	Am't.	Date.	Am't.	Date.	Am't.	Date.
Hastings town plat. NE. NW	"	"	"	"	3 20	"	10 20	"	9 20	"	82 12	Feb. 21, '74. paid as town lots.
Hastings town plat. NW. NW	"	"	"	41.09	3 28	"	10 20	"	9 20	"		
Hastings town plat. SW. NW	"	"	"	40.84	3 28	"	10 20	"	8 86	"		
Hastings town plat. SE. NW	"	"	"	40	3 20	"	10 20	"	8 86	"		
NE. NE	4	73	"	35.94	2 49	Feb. 24, '71	5 05	"	4 68	Sept. 30, '73		
SE. NE	"	"	"	40	2 76	"	5 40	"	4 68	"		
NE. SE	"	"	"	"	2 76	"						
NW. SE	"	"	"	"	2 76	"						
SW. SE	"	"	"	"	2 76	"						
SE. SE	"	"	"	"	2 76	"						
NW. NE	9	"	"	"	2 76	"	4 40	Feb. 27, '72	4 84	Sept. 30, '73		
SW. NE	"	"	"	"	2 76	"	4 40	"	4 84	"		
NE. SW	"	"	"	"	3 12	"	8 80	"	5 28	Feb. 26, '73	4 40	Feb. 16, '74.
NW. SW	"	"	"	"	3 12	"	8 80	"	5 28	"	4 40	"
SW. SW	"	"	"	"	3 12	"	8 80	"	5 28	"	3 40	"
SE. SW	"	"	"	"	3 12	"	8 80	"	5 28	"	4 40	"
NE. NW	10	"	"	"	3 66	"	5 91	Sept. 30, '72	5 04	Sept. 30, '73	4 23	March 13, '74.
NW. NW	"	"	"	"	3 66	"	5 91	"	5 04	"	3 40	"
195 SW. NW	10	73	40	40	3 66	Feb. 24, '71	5 91	Sept. 30, '72	5 04	Sept. 30, '73	3 40	March 13, '74
SE. NW	"	"	"	"	3 66	"	5 91	"	5 04	"	4 24	"
NW. SW	14	"	"	"								
SW. SW	"	"	"	"								
NW. SE	17	"	"	"	2 76	Feb. 24, '71	4 70	Feb. 29, '72	2 80	Feb. 26, '73	3 36	Feb. 16, '74.
SE. NE	20	"	"	"					Deeded	Sept. 14, '72	Deeded	
NE. SE	"	"	"	"					"	"	"	
SE. SE	"	"	"	"					"	"	"	
NE. NE	21	"	"	"	4 02	Feb. 24, '71	8 16	Feb. 29, '72	3 50	Feb. 26, '73		
NW. NE	"	"	"	"	4 02	"	8 16	"	3 50	"		
SW. NE	"	"	"	"	4 02	"	8 16	"	3 50	"		
SE. NE	"	"	"	"	4 02	"	8 16	"	3 50	"		
SW. SW	"	"	"	"	3 66	"	4 08	"	2 80	"	3 36	Feb. 16, '74.
SE. SW	"	"	"	"	3 66	"	4 08	"	2 80	"	3 36	"
NE. SE	"	"	"	"	3 66	"	8 16	"	3 50	Feb. 27, '73		
NW. SE	"	"	"	"	3 66	"	8 16	"	3 50	"		
SW. SE	"	"	"	"	3 66	"	8 16	"	3 50	"	3 36	Feb. 16, '74
SE. SE	"	"	"	"	3 66	"	8 16	"	3 50	"	3 36	"
SW. SW	22	"	"	"	3 66	"	8 16	"	4 00	"	4 80	Sept. 30, '74.
NW. SE	"	"	"	"	4 26	"	5 10	"	4 00	"	4 20	Feb. 16, '74.
NE. NE	28	"	"	"	3 66	"	4 08	"	2 80	"	3 36	"

NW. NE	"	"	"	"	3 66		"	..	4 08		"	..	2 80	"	..	3 36	"
SW. NE	"	"	"	"	3 66		"	..	4 08		"	..	2 80	"	..	3 36	"
SE. NE	"	"	"	"	3 66		"	..	4 08		"	..	2 80	"	..	3 36	"
NE. NW	"	"	"	"	3 66		"	..	4 08		"	..	2 80	"	..	4 20	"
NW. NW	"	"	"	"	3 66		"	..	4 08		"	..	2 80	"	..	4 20	"
SW. NW	"	"	"	"	3 66		"	..	4 08		"	..	2 80	"	..	4 20	"
SE. NW	"	"	"	"	3 66		"	..	4 08		"	..	2 80	"	..	4 20	"
NE. SW	"	"	"	"	3 66		"	..	4 08		"	..	2 80	"	..	3 36	"
NW. SW	28	73	40	40	$3 66	Feb. 24, '71		..	$4 08	Feb. 29, '72		..	$2 80	Feb. 27, '73	..	$3 36	Feb. 16, 74.
NW. SE	"	"	"	"	3 66		"	..	4 08		"	..	2 80	"	..	.....	.....
SW. SE	"	"	"	"	3 66		"	..	4 08		"	..	2 80	"	..	.....	.....
NE. NE	29	"	"	"	2 76		"	..	3 76		"	..	2 80	"	..	3 36	Feb, 16, '74.
SW. NE	"	"	"	"	2 76		"	..	3 76		"	..	2 80	"	..	3 36	"
SE. NE	"	"	"	"	2 76		"	..	3 76		"	..	2 80	"	..	3 36	"
SE. NW	"	"	"	"	3 12		"	..	4 70		"	..	3 50	"	..	3 36	"
NE. SW	"	"	"	"	2 76		"	..	4 70		"	..	3 50	"	..	3 36	"
SE. SW	"	"	"	"	2 76		"	..	4 70		"	..	3 50	"	..	3 36	"
NE. SE	"	"	"	"	2 76		"	..	3 76		"	..	2 80	"	..	3 36	"
NW. SE	"	"	"	"	2 76		"	..	3 76		"	..	2 80	"	..	3 36	"
SW. SE	"	"	"	"	2 76		"	..	3 76		"	..	2 80	"	..	3 36	"
SE. SE	"	"	"	"	2 76		"	..	3 76		"	..	2 80	"	..	3 36	"
NE. NE	31	"	"	"	3 12		"	..	4 70		"	..	3 50	"	..	3 36	"
NW. SE	"	"	"	"	3 12		"	..	4 70		"	..	3 50	"	..	3 36	"
SW. NE	"	"	"	"	3 12		"	..	4 70		"	..	3 50	"	..	3 36	"
SW. NW	"	"	"	"	2 73		"	..	4 10		"	..	3 07	"	..	2 94	"
SE. NW	"	"	"	"	3 12		"	..	4 70		"	..	3 50	"	..	3 36	"
W. h. SW. NE	2	71	41	20	81		"	..	2 55		"	..	2 64	Feb. 24, '73	..	2 38	"
SW. SW	"	"	"	40	1 62		"	..	5 08		"	..	6 00	"	..	4 76	"
SW. SE	9	"	"	"	3 42		"	..	6 24		"	..	6 60	"	..	4 76	Feb. 17, '74.
SE. SE	"	"	"	"	3 42		"	..	6 24		"	..	6 60	"	..	4 76	"
SW. SW	10	"	"	"	2 64		"	..	5 33		"	..	6 60	"	..	.....	.....
NE. NW	11	"	"	"	1 62		"	..	4 96		"	..	6 00	"	..	4 76	Feb. 17, '74.
NW. NW	"	"	"	"	1 62		"	..	5 33		"	..	6 00	"	..	4 76	"
SE. NW	"	"	"	"	Deeded.	March 19, '64			Deeded.				Deeded.			Deeded.	.....
NW. NW	15	"	"	"	1 62	Feb. 24, '71		..	5 33	Feb. 29, '72		..	6 60	Feb. 28, '73	..	4 76	Feb. 17, '74.
SW. NW	"	"	"	"	1 62		"	..	5 33		"	..	6 60	"	..	4 76	"
SE. SW	"	"	"	"	1 98		"	..	5 33	H.S. R.	"	..	6 41	August 14, '73	..	.....	.....
197 NW. SE	15	71	41	40	$1 98	Feb. 24, '71		..	$5 33	H.S. R.	"	..	$9 42	August 25, '73	..	.....	.....
SW. SE	"	"	"	"	1 98		"	..	5 33	H.S. R.	"	..	9 42	"	..	.....	.....
NW. NE	28	"	"	"	1 62		"	..	5 04		"	..	5 04	Feb. 28, '73	..	$4 76	Feb. 17, '74.
SW. NE	"	"	"	"	1 62		"	..	5 04		"	..	5 04	"	..	4 76	"
SE. NW	"	"	"	"	3 42		"	..	6 84		"	..	5 04	"	..	8 00	"
NW. SW	"	"	"	"	Not taxed				6 84		"	..	5 04	"	..	8 00	"
SW. SW	"	"	"	"	"		"		6 84		"	..	5 04	"	..	8 00	"
NE. SW	29	"	"	"	3 42	Feb. 24, '71		..	6 84		"	..	5 04	"	..	8 00	"
SE. SW	"	"	"	"	3 78		"	..	6 84		"	..	5 04	"	..	6 80	"
NW. SE	"	"	"	"	3 78		"	..	6 84		"	..	5 04	"	..	8 00	"
SW. SE	"	"	"	"	3 78		"	..	6 84		"	..	5 04	"	..	8 00	"
SE. SE	31	"	"	"	3 42		"	..	.....				.....			.....	.....
SE. NE	32	"	"	"	3 42		"	..	6 84	Feb. 29, '72	..		5 04	Feb. 28, '73	..	8 00	Feb. 17, '74.
NE. SW	"	"	"	"	3 42		"	..	.....				.....			9 50	Sept. 30, '74.
NW. SW	"	"	"	"	3 42		"	..	.....				.....			12 24	"

EXHIBIT A—Continued.

Part of section.	S.	T.	R.	Acres.	Taxes paid for 1870.		Taxes paid for 1871.		Taxes paid for 1872.		Taxes paid for 1873.	
					Am't.	Date.	Am't.	Date.	Am't.	Date.	Am't.	Date.
SW. SW	"	"	"	"	3 42	"					25 50	"
SE. SW	"	"	"	"	3 42	"					9 50	"
NE. SE	"	"	"	"	3 42	"					7 60	"
NW. SE	"	"	"	"	3 42	"					7 60	"
SW. SE	"	"	"	"	3 42	"					7 60	"
SE. SE	"	"	"	"	3 42	"					7 60	"
NE. NE	33	"	"	"	1 98	"			Deeded.	Dec. 14, '71	Deeded.	
SE. NE	"	"	"	"	1 98	"			"	"		
NE. SW	"	"	"	"	3 42	"	5 70	Feb. 29, '72	4 20	Feb. 28, '73	9 06	Sept. 30, '74.
NW. SW	"	"	"	"	3 42	"			Deeded.	April 22, '72	Deeded.	
SW. SW	"	"	"	"	3 42	"	5 70	Feb. 29, '72	4 20	Feb. 28, '73		
SE. SW	"	"	"	"	3 42	"	5 70	"	4 20	"	9 06	Sept. 30, '74.
NE. SE	"	"	"	"	1 62	"						
SE. SE	"	"	"	"	1 62	"						
NE. SW	13	72	41	40	$3 84	Feb. 24, '71	Deeded.	Jan. 30, '71	Deeded.		Deeded.	
NW. SW	"	"	"	"	3 84	"	"	"	"		"	
SW. SW	"	"	"	"	3 84	"	"	"	"		"	
SE. SW	"	"	"	"	3 84	"	"	"	"		"	
NW. SE	"	"	"	"	3 80	"	$4 50	Feb. 29, '72	$3 00	Feb. 28, '73	$2 00	Feb. 17, '74.
SW. SE	"	"	"	"	3 80	"	4 50	"	3 00	"	2 00	"
NE. NE	23	"	"	"	3 84	"	Deeded.	Jan. 30, '71	Deeded.		Deeded.	
NW. NE	"	"	"	"	3 84	"	"	"	"		"	
SW. NE	"	"	"	"	3 84	"	"	"	"		"	
SE. NE	"	"	"	"	3 80	"	4 50	Feb. 29, '72	3 00	Feb. 28, '73	2 50	Feb. 17, '74.
NE. SE	"	"	"	"	3 80	"	3 60	"	2 22	"	1 39	"
NW. NE	24	"	"	"	3 84	"	9 00	"	8 40	"	3 44	"
SW. NE	"	"	"	"	Deeded.	Jan. 17, '70	Deeded.		Deeded.		Deeded.	
NW. NW	"	"	"	"	3 84	Feb. 24 '71	9 00	Feb. 29, '72	8 40	Feb. 28, '73	3 44	Feb. 17, '74.
SW. NW	"	"	"	"	3 20	"	5 10	"	4 60	"	3 44	"
SE. NW	"	"	"	"	3 84	"	9 00	"	8 40	"	3 44	"
NE. SW	"	"	"	"	3 84	"	9 00	"	7 76	"	3 18	"
NW. SW	"	"	"	"	3 20	"	5 10	"	4 27	"	3 18	"
NE. NE	26	"	"	"	3 26	"	5 10	"	3 00	"	2 48	"
NW. NE	"	"	"	"	3 20	"	5 10	"	3 00	"	2 48	"
SW. NE	"	"	"	"	3 20	"	5 10	"	3 00	"	2 48	"
SE. NE	"	"	"	"	3 20	"	5 10	"	3 00	"	2 48	"
NE. SE	"	"	"	"	3 80	Feb. 28, '71	5 10	"	3 40	"	2 48	"
NW. SE	"	"	"	"	3 80	"	4 50	"	3 40	"	2 48	"
SW. SE	"	"	"	"	3 80	"	5 10	"	3 40	"	2 48	"
NW. NE	1	73	42	34. 80	3 80	Oct. 27, '71						
NE. SW	"	"	"	40	Deeded.	Jan. 17, '70	Deeded.		Deeded.		Deeded.	

SE. SW	"	"	"	"	"	"	"		"		"		
NW. NW	13	"	"	"	3 60	Feb. 24, '71							
199 NW. NE	19	73	42	40	$3 36	Feb. 24, '71							
SW. NE	"	"	"	"	3 36	"							
SE. SW	"	"	"	"	Deeded.	Oct. 24, '70	Deeded.		Deeded.		Deeded.		
NW. SE	"	"	"	"	3 36	Feb. 24, '71							
SW. SE	"	"	"	"	3 36	"							
NE. NW	31	"	"	"	Deeded.	Jan. 17, '70	Deeded.		Deeded.		Deeded.		
NE. NW	1	71	43	29. 84	"	July 15, '64	"		"		"		
NW. NW	"	"	"	29. 62	"	"	"		"		"		
SW. NW	"	"	"	40	"	"	"		"		"		
SE. NW	"	"	"	"	"	"	"		"		"		
NW. SE	"	"	"	"	"	"	"		"		"		
SW. SE	"	"	"	"	1 62	Feb. 24, '71	$1 65	Feb. 29, '72	$1 80	Feb. 28, '73	$2 35	Feb. 17, '74	
NE. NW	2	"	"	28. 58	1 62	"	1 65	"	1 80	"	2 35	"	
NW. NW	"	"	"	28. 25	1 22	"	1 99	"	2 13	"	2 53	"	
SW. NW	"	"	"	40	1 18	"	1 92	"	2 13	"	2 47	"	
NE. NE	3	"	"	27. 98	1 68	"	2 75	"	3 00	"	3 52	"	
NW. NE	"	"	"	27. 86	1 18	"	1 92	"	2 10	"	2 47	"	
SW. NE	"	"	"	40	Deeded.	March 19, '64	Deeded.		Deeded.		Deeded.		
SE. NE	"	"	"	"	"	"	"		"		"		
NE. NW	"	"	"	27. 75	1 68	Feb. " '74	2 75	Feb. 29, '72	3 00	Feb. 28, '73	3 16	Feb. 17, '74	
NW. NW	"	"	"	27. 65	1 18	"	1 92	"	2 09	"	2 17	"	
SW. NW	"	"	"	40	1 14	"	1 92	"	2 09	"	2 17	"	
SE. NW	"	"	"	"	1 68	"	2 75	"	3 00	"	3 13	"	
NE. SE	"	"	"	"	1 68	"	2 75	"	3 00	"	3 13	"	
NW. SE	"	"	"	"	1 68	"	2 75	"	3 00	"	2 74	"	
SW. SE	"	"	"	"	1 26	"	5 19	"	6 00	"	6 26	"	
SE. SE	"	"	"	"	1 26	"	5 19	"	6 00	"	6 26	"	
NE. NE	"	"	"	"	1 68	"	2 75	"	3 00	"	2 74	"	
NW. NW	4	"	"	27. 43	1 14	"	1 86	"	2 04	"	1 27	"	
200 SW. SE	"	"	"	26. 33	1 09	"	1 86	"	1 82	"	90	"	
SE. SE	4	71	43	40	$1 68	Feb. 24, '71	$2 75	Feb. 29, '72	$3 00	Feb. 28, '73	$1 37	Feb. 17, '74	
SW. NE	"	"	"	"	"	"	2 75	"	3 00	"	1 37	"	
SE. NE	5	"	"	"	Deeded	Dec. 1, '64	Deeded		Deeded		Deeded		
NE. NW	"	"	"	25. 82	"	Jan. 27, '66	"		"		"		
NW. NW	"	"	"	25. 67	1 05	Feb. 24, '71	1 44	J. N. D. Feb. 29, '72.	1 41	Feb. 28, '73	90	Feb. 17, '74.	
SW. NW	"	"	"	40	1 05	"	1 43	J. N. D. "	1 40	"	88	"	
SE. NW	"	"	"	"	1 62	"	2 20	J. N. D. "	2 16	"	1 38	"	
NE. SE	"	"	"	"	1 62	"	2 20	J. N. D. "	2 16	"	2 29	"	
NW. SE	"	"	"	"	Deeded	Dec. 11, '65	Deeded		Deeded		Deeded		
SW. SE	"	"	"	"	"	Dec. 7, '63	"		"		"		
SE. SE	"	"	"	"	"	Nov. 24, '64	"		"		"		
NW. NE	9	"	"	"	1 68	Feb. 24. '71	2 87	Feb. 29, '72	2 81	Feb. 28, '73	1 37	Feb. 17, '74.	
NE. NW	"	"	"	"	1 68	"	2 87	"	2 70	"	1 27	"	
NW. NW	"	"	"	"	1 68	"	2 87	"	2 70	"	1 37	"	
NW. NE	10	"	"	"	2 16	"	3 30	"	3 01	"	2 11	"	
SW. NE	"	"	"	"	2 16	"	2 75	"	3 02	"	2 11	"	
NE. NW	"	"	"	"	4 32	"	5 50	"	5 48	"	7 82	"	
SE. NW	"	"	"	"	4 32	"	5 50	"	5 48	"	6 26	"	
NE. SW	17	"	"	"	Deeded	March 19, '64	Deeded		Deeded		Deeded		

EXHIBIT A—Continued.

Part of section.	S.	T.	R.	Acres.	Taxes paid for 1870.		Taxes paid for 1871.		Taxes paid for 1872.		Taxes paid for 1873.	
					Am't.	Date.	Am't.	Date.	Am't.	Date.	Am't.	Date.
NW. SW	"	"	"	"	2 04	"	2 75	J. N. D. Feb 29, '72.	3 03	Sept. 30, '73	2 69	Sept. 30, '74.
SW. SW	"	"	"	"	2 04	"	2 39	J. N. D. "	3 03	"	2 38	"
SE. SW	"	"	"	"	2 04	"	2 75	J. N. D. "	3 03	"	2 15	"
NE. SE	"	"	"	"	Deeded	March 19, '64	Deeded		Deeded		Deeded	
NW. SE	"	"	"	"	"	"	"		"		"	
SW. SE	"	"	"	"	2 04	Feb. 24, '71	2 75	J. N. D. Feb. 29, '72.	3 03	Sept. 30, '70	2 15	Sept. 30, '74.
SE. SE	"	"	"	"	Deeded	Oct. 10, '64	Deeded		Deeded		Deeded	
NE. NE	18	"	"	"	1 68	Feb. 24, '71	2 87	Feb. 29, '72	2 08	Feb. 28, '73	1 83	Feb. 19, '74.
NE. NE	20	"	"	"	1 79	"	2 35	"	2 39	"	"	"
201 SE. NE	20	71	43	40	1 79	Feb. 24, '71	2 35	Feb. 29, '72	2 39	Feb. 28, '73	1 83	Feb. 19, '74.
NE. SE	"	"	"	"	2 16	"	2 93	"	3 27	"	1 83	"
NW. SE	"	"	"	"	1 68	"	3 52	"	3 27	"	2 75	"
SE. SE	"	"	"	"	2 16	"	2 93	"	3 01	"	1 83	"
SW. NW	21	"	"	"	Deeded	Aug. 23, '64	Deeded		Deeded		Deeded	
NW. SW	"	"	"	"	"	"	"		"		"	
SW. SW	"	"	"	"	"	Oct. 10, '64	"		"		"	
NW. NW	28	"	"	"	1 62	Feb. 24, '71	2 35	Feb. 29, '72	2 41	Feb. 28, '73	1 60	Feb. 19, '74.
SW. NW	"	"	"	"	1 62	"	2 35	"	2 41	"	1 60	"
NW. SW	"	"	"	"	1 62	"	2 35	"	2 41	"	1 60	"
NE. SE	29	"	"	"	1 26	"	2 93	"	2 97	"	1 60	"
SE. SE	"	"	"	"	Deeded	Nov. 24, '64	Deeded		Deeded		Deeded	
Lot 1, NE. NE	31	"	"	1. 65	5	"	29	Feb. 29, '72	29	Feb. 28, '73	05	Feb. 19, '74.
NE. SE	32	"	"	"	2 16	"	2 86	"	2 97	"	1 84	"
SE. SE	"	"	"	"	2 16	"	2 57	"	2 61	"	1 84	"
SW. NE	34	"	"	"	1 84	"	2 39	"	2 34	"	92	"
NW. NW	"	"	"	"	1 56	"	2 75	"	2 70	"	1 69	"
NE. SE	"	"	"	"	1 84	"	2 75	"	2 70	"	76	"
NW. SE	"	"	"	"	1 84	"	2 75	"	2 70	"	1 37	"
SE. SE	"	"	"	"	1 84	"	2 75	"	2 70	"	76	"
NW. SW	35	"	"	"	2 03	"	1 65	"	1 62	"	92	"
SW. SW	"	"	"	"	2 03	"	1 65	"	1 62	"	76	"
SE. SW	"	"	"	"	1 74	"	1 65	"	1 62	"	76	"
SW. SE	"	"	"	"	1 84	"	2 75	"	2 70	"	1 83	"
NE. NE	5	72	"	31. 03	3 28	Feb. 24, '71	2 97	"	3 52	"	1 53	Feb. 20, '74.
NE. SW	17	"	"	"	3 28	"	5 44	"	4 00	"	3 90	"
NW. SW	"	"	"	"	3 28	"	5 44	"	4 00	"	3 90	"
SW. SW	"	"	"	"	3 28	"	4 96	"	3 52	"	3 90	"
SE. SW	"	"	"	"	3 28	"	5 44	"	4 00	"	3 90	"

202	NW. SE	17	72	43	40	$3 50	Feb. 24, '71	$3 84	Feb. 29, '72	$4 00	Feb. 28, '73	$3 90	Feb. 20, '74.
	SW. SE	"	"	"	"	3 50	"	3 84	"	4 00	"	3 90	"
	SE. SE	"	"	"	"	3 50	"	3 84	"	4 00	"	3 90	"
	SE. NW	19	"	"	"	3 50	"	5 44	"	4 00	"	3 90	"
	NE. NE	20	"	"	"	3 50	"	3 84	"	5 28	"	3 00	"
	NW. NE	"	"	"	"	3 50	"	3 84	"	5 28	"	3 90	"
	SW. NE	"	"	"	"	3 50	"	3 84	"	5 28	"	3 90	"
	SE. NE	"	"	"	"	3 50	"	3 84	"	5 28	"	3 90	"
	NE. NW	"	"	"	"	3 50	"	5 44	"	5 28	"	3 90	"
	NW. NW	"	"	"	"	3 50	"	5 44	"	5 28	"	3 90	"
	SW. NW	"	"	"	"	3 50	"	5 44	"	5 28	"	3 90	"
	SE. NW	"	"	"	"	3 50	"	5 44	"	5 28	"	3 90	"
	NE. SW	"	"	"	"	3 50	"	4 96	"	5 28	"	3 90	"
	NW. SW	"	"	"	"	3 50	"	4 96	"	5 28	"	3 90	"
	SW. SW	"	"	"	"	3 50	"	4 96	"	5 28	"	3 90	"
	SE. SW	"	"	"	"	3 50	"	4 96	"	4 80	"	3 90	"
	SE. SE	"	"	"	"	3 50	"	3 36	"	4 80	"	3 90	"
	SE. SW	26	"	"	"	6 72	"	3 41	"	2 32	"	2 94	"
	NW. SW	27	"	"	"	6 72	"	5 12	"	2 90	"	5 43	"
	NE. NE	29	"	"	"	4 10	"	4 80	"	6 11	"	2 34	"
	NW. NE	"	"	"	"	4 10	"	4 80	"	6 11	"	2 34	"
	SW. NE	"	"	"	"	4 10	"	4 80	"	6 60	"	2 34	"
	NW. NW	"	"	"	"	4 10	"	5 44	H.S. "	4 89	"	2 34	"
	SW. NW	"	"	"	"	4 10	"	5 44	"	5 28	"	3 34	"
	NW. SW	"	"	"	"	4 10	"	5 44	"		"		"
	SW. SW	"	"	"	"	4 10	"	5 44	"		"		"
	SW. SE	30	"	"	"	2 46	"	5 44	"		"	2 34	Feb. 28, '74.
	NE. NE	31	"	"	"	3 28	"	5 44	H. S. R "	4 00	Feb. 28, '73.	2 34	"
	NW. NE	"	"	"	"	3 28	"	6 80	"	3 71	"	2 34	"
203	SW. NE	31	72	43	40	$3 28	Feb. 24, '71	$6 80	Feb. 29, '72	4 63	"	2 34	"
	SE. NE	"	"	"	"	3 28	"	5 44	"	$5 00	Feb. 28, '73.	$2 34	Feb. 20, 74.
	NE. SE	"	"	"	"	3 28	"	5 44	"	4 00	"	2 34	"
	NW. SE	"	"	"	"	3 28	"	6 80	"	4 00	"	2 34	"
	SW. SE	"	"	"	"	3 28	"	6 80	"	5 00	"	2 34	"
	SE. SE	"	"	"	"	3 28	"	5 44	"	5 00	"	2 34	"
	NW. NW	32	"	"	"	4 10	"	6 80	H. S. R "	4 00	"	2 34	"
	SW. NW	"	"	"	"	4 10	"	5 44	"	5 94	"	2 34	"
	NW. SW	"	"	"	"	3 28	"	5 44	"	5 94	"	2 34	"
	SW. SW	"	"	"	"	3 28	"	5 44	H. S. R "	5 28	"	2 34	"
	SE. SW	"	"	"	"	4 10	"	6 80	"	5 28	"	2 34	"
	NE. NE	33	"	"	"	3 50	"	5 04	"	6 60	"	7 80	"
	NW. NE	"	"	"	"	3 50	"	3 36	"	7 20	"	3 90	"
	NE. NW	"	"	"	"	3 50	"	3 36	"	4 80	"	3 90	"
	NW. NW	"	"	"	"	3 50	"	3 84	"	4 80	"	3 90	"
	SW. NW	"	"	"	"	3 50	"	3 84	J. N. D.	4 44	"	3 90	"
	NW. SW	"	"	"	"	7 00	"	5 04	J. N. D.	4 44	"	6 24	"
	SW. SW	"	"	"	"	7 00	"	5 04	J. N. D.	6 66	"	6 24	"
	SE. SW	"	"	"	"	5 74	"	6 72		6 66	"	6 24	"
	SW. SE	"	"	"	"	3 50	"	3 36		9 60	"	3 90	Feb. 21, '74.
	SE. SE	"	"	"	"	3 50	"	3 36		4 80	"	3 90	"
	NW. NW	35	"	"	"	1 92	"	5 70	"	4 80	"	2 71	"
	NE. NW	17	73	"	"	3 36	"		"	2 76	"		"

EXHIBIT A—Continued.

Part of section.	S.	T.	R.	Acres.	Taxes paid for 1870.		Taxes paid for 1871.		Taxes paid for 1872.		Taxes paid for 1873.	
					Am't.	Date.	Am't.	Date.	Am't.	Date.	Am't.	Date.
SE. NW	"	"	"	"	3 36	"						
NE. SW	"	"	"	"	2 52	"			3 22	Sept. 30, '73	4 00	Sep. 30, '74.
SE. SW	"	"	"	"	2 52	"			3 23	"	1 53	"
NW. NE	18	"	"	"	1 62	"	1 28	Feb. 29, '72	1 84	Feb. 28, '73	95	Feb. 21, '74.
SW. NE	19	"	"	"	1 08	"	1 28	"	1 84	"	1 08	"
NW. NW	"	"	"	40.30	1 66	"	1 92	"	2 76	"	1 12	"
NE. SE	19	73	43	40	$1 62	Feb. 24, '71	$1 28	Feb. 29, '72	$1 84	Feb. 28, '73	$1 08	Feb. 21, '74.
NE. NW	20	"	"	"	3 04	"	1 80	"	1 61	Sept. 30, '72	3 15	Sep. 30, '74.
SW. NW	"	"	"	"	3 04	"	1 80	"	1 60	Feb. 28, '73	2 28	Feb. 21, '74.
SE. NW	"	"	"	"	3 04	"	1 80	"	1 60	"	2 28	"
NW. SW	"	"	"	"	3 04	"	1 80	"	1 60	"	3 80	"
SW. SW	"	"	"	"	3 04	"	1 80	"	1 60	"	3 80	"
NE. NE	30	"	"	"	1 62	"	1 92	"	2 76	"	1 08	"
SW. NE	"	"	"	"	1 62	"	1 92	"	2 76	"	1 08	"
NE. SW	"	"	"	"	1 62	"	1 92	"	2 76	"	1 08	"
NW. NE	1	72	44	31.04	2 56	"	1 95	"	2 75	"	1 83	Feb. 22, '74.
SW. NE	"	"	"	40	2 10	"	2 52	"	3 65	"	1 58	"
Lot 1, NE. NE	2	"	"	4.78	44	"		Not taxed		Not taxed		Not taxed.
Lot , E. h. NE	11	"	"	15.68	1 40	"	1 92	Feb. 29, '72	1 86	Feb. 28, '73		"
NE. NE	12	"	"	40	4 10	"	4 96	"	5 28	"	1 40	Feb. 22, '74.
NE. NW	"	"	"	"	3 50	"		Not taxed		Not taxed	98	"
SE. NW	"	"	"	"	3 50	"		"		"	98	"
SE. SW	"	"	"	"	3 50	"	5 44	Feb. 29, '72	5 28	Feb. 28, '73	98	"
SW. SE	"	"	"	"	3 50	"	5 44	"	5 28	"	98	"
NW. NE	13	"	"	"	2 46	"	6 80	"	5 00	"	1 56	Feb. 21, '74.
SW. NE	"	"	"	"	2 80	"	6 80	J.N.D. "	5 00	"	1 56	"
NE. NW	"	"	"	"	3 28	"	6 80	"	5 00	"	1 56	"
NW. SE	"	"	"	"	3 28	"	5 44	"	4 00	"	2 34	"
NE. NE	36	"	"	"	2 80	"	5 44	"	3 52	"	2 34	"
NE. SE	"	"	"	"	2 46	"	5 44	"	4 00	"	1 56	"
Lot 4, SW. SE	"	"	"	26.74	2 36	"		Not taxed		Not taxed		Not taxed.
Lot 2, W. h. SE	23	73	"	42		Not taxed						
Lot 3, E. h. SW	"	"	"	22.50		"		"		"		"
Lot 1 { NE. NW / NW. NW	26	"	"	47.20		"		"		"		"
	"	"	"			"		"		"		"
205 NE. NE	36	73	44	40	$2 10	Feb. 24, '71	$1 68	Feb. 29, '72	$2 40	Feb. 28, '73	$1 40	Feb. 21, '74.
Total					912 04		1,230 65		1,063 0		919 47	

Grand total for 1870, 1871, 1872, and 1873, $4,125.36.

SUPPLEMENTAL LIST.

Part of section.	S.	T.	R.	Acres.	Taxes paid for 1870.		Taxes paid for 1871.		Taxes paid for 1872.		Taxes paid for 1873.	
					Am't.	Date.	Am't.	Date.	Am't.	Date.	Am't.	Date.
NW. SE	7	72	40	40	$3 20	Feb. 24, '71..	$5 10	Feb. 29, '72..	$4 60	Feb. 22, '73..	$2 96	Feb. 16, '74.
SW. SE	"	"	"	40	3 20	" ..	5 10	" ..	4 60	" ..	2 96	"
NW. SW	1	71	43	40	1 68	" ..	2 20	" ..	2 40	Feb. 28, '73..	2 35	Feb. 17, '74.
SW. SW	"	"	"	40	1 68	" ..	2 20	" ..	2 40	" ..	2 35	"
Total of supplemental list					$9 76		$14 60		$14 00		$10 62	
Total of both lists					921 80		1,245 25		1,077 20		930 09	

Grand total	$4,260 32
Deduct	85 98
	$4,154 34

Swamp sections quitclaimed by the B. & M. to Mills County.—Certified to B. & M. 11,492.37; *not certified,* 480; *total,* 11,972.37 *acres.*

Part of section.	S.	T.	R.	Date of sale.	Kind of sale.	Acres.
NW. NW	5	72	40	Oct. 20, 1869	84½	27.02
NW. NW	17	"	"	"	"	40
SW. NW	"	"	"	"	"	"
SW. NE	19	"	"	"	"	"
SE. NE	"	"	"	"	"	"
NE. NW	1	73	"	"	"	35.23
SE. NW	"	"	"	"	"	40
NW. NW	3	"	"	"	"	35.85
SW. NW	"	"	"	"	"	40
NW. SW	"	"	"	"	"	"
SW. SW	"	"	"	"	"	"
NE. SE	11	"	"	"	"	"
SW. SE	"	"	"	"	"	"
SE. SE	"	"	"	"	"	"
SE. NE	15	"	"	"	"	"
NE. NW	"	"	"	"	"	"
NW. NW	"	"	"	"	"	"
SW. NW	"	"	"	"	"	"
SE. NW	"	"	"	"	"	"
NE. SW	"	"	"	Jan. 30, 1871	121	"
NW. SW	"	"	"	"	"	"
SW. SW	"	"	"	"	"	"
SE. SW	"	"	"	"	"	"
NE. SE	"	"	"	Oct. 20, 1869	84½	"
NW. SE	"	"	"	"	"	"
SW. SE	"	"	"	"	"	"
SE. SE	15	73	40	Oct. 20, 1869	84½	40
SW. SE	17	"	"	"	"	"
SE. SE	"	"	"	"	"	"
NE. NW	21	"	"	Jan. 30, 1871	"	"
NW. NW	"	"	"	"	"	"
SW. NW	"	"	"	"	"	"
SE. NW	"	"	"	"	"	"
NE. SW	"	"	"	Oct. 20, 1869	"	"
NW. SW	"	"	"	"	"	"
NW. NE	29	"	"	Jan. 30, 1871	121	"
NE. NW	"	"	"	"	"	"
NW. NW	"	"	"	Oct. 20, 1869	84½	"
SW. NW	"	"	"	Jan. 30, 1871	121	"
NW. SW	"	"	"	"	"	"
NE. NW	31	"	"	"	"	"
NW. NW	"	"	"	"	"	34.65
SE. SW	"	"	"	Oct. 20, 1869	84½	40
NE. SE	"	"	"	"	"	"
NW. SE	"	"	"	"	"	"
SW. SE	"	"	"	"	"	"
SE. SE	"	"	"	"	"	"
NE. NE	9	71	41	Jan. 30, 1871	121	"
NW. NE	"	"	"	"	"	"
SW. NE	"	"	"	Oct. 20, 1869	84½	"
SE. NE	"	"	"	"	"	"
NE NW	"	"	"	Jan. 30, 1871	121	"
207 NW. NW	9	71	41	January 30, '71	121	40
SW. NW	"	"	"	"	"	"
SE. NW	"	"	"	"	"	"
NE. SW	"	"	"	"	"	"
NW. SW	"	"	"	"	"	"
SW. SW	"	"	"	"	"	"
SE. SW	"	"	"	"	"	"
NE. SE	"	"	"	October 20, '69	84½	"
NW. SE	"	"	"	"	"	"
SW. NW	11	"	"	"	"	"
NW. SW	"	"	"	"	"	"
SW. SW	"	"	"	"	"	"
NE. NE	15	"	"	"	"	"
NW. NE	"	"	"	"	"	"
SW. NE	"	"	"	"	"	"
SE. NE	"	"	"	"	"	"
NE SE	"	"	"	"	"	"
SE. SE	"	"	"	"	"	"
NE. NE	17	"	"	"	"	"
NE. NE	21	"	"	"	"	"
NW. NE	"	"	"	"	"	"
SW. NE	"	"	"	"	"	"
SE. NE	"	"	"	"	"	"
NE. SW	"	"	"	"	"	"
NW. SW	"	"	"	"	"	"
SW. SW	"	"	"	"	"	"
SE. SW	"	"	"	"	"	"
NE. SE	"	"	"	"	"	"

NW. SE	"	"	"	"	"	"	"	NE. SE	"	"	"	"	"	"	"	
SW. SE	21	71	41	October 20, '69	84½	40		SE. SE	"	"	"	"	"	"	"	
SE. SE	"	"	"	"	"	"		NE. SW	29	"	"	"	"	"	"	
NW. NE	27	"	"	January 30, '71	121	"		NW. SW	"	"	"	"	"	"	"	
SW. NE	"	"	"	"	"	"		SW. SW	"	"	"	"	"	"	"	
NE. NW	"	"	"	October 20, '69	84½	"		SE. SW	"	"	"	"	"	"	"	
NW. NW	"	"	"	"	"	"		NE. NE	35	"	"	January 30, '71	121	"		
SW. NW	"	"	"	"	"	"		NW. NE	35	72	41	January 30, '71	121	40		
SE. NW	"	"	"	"	"	"		SW. NE	"	"	"	"	"	"		
NE. SW	"	"	"	January 30, '71	121	"		SE. NE	"	"	"	"	"	"		
NW. SW	"	"	"	October 20, '69	84½	"		NW. NW	"	"	"	October 20, '69	84½	"		
SW. SW	"	"	"	"	"	"		NE. SW	"	"	"	January 30, '71	121	"		
SE. SW	"	"	"	"	"	"		NW. SW	"	"	"	E. ½ Jan. 30, '71.	121	"		
NW. SE	"	"	"	January 30, '71	121	"						W. ½ Oct. 20, '69	84½			
NE. NE	29	"	"	October 20, '69	84½	"		SW. SW	"	"	"	October 20, '69	84½	"		
SE. NE	"	"	"	"	"	"		SE. SW	"	"	"	"	"	"		
NE. NW	"	"	"	"	"	"		NE. SE	"	"	"	"	"	"		
SE. NW	"	"	"	"	"	"		NW. SE	"	"	"	"	"	"		
NW. SW	"	"	"	January 30, '71	121	"		SW. SE	"	"	"	"	"	"		
NE. SE	"	"	"	October 20, '69	84½	"		SE. SE	"	"	"	"	"	"		
SE. SE	"	"	"	"	"	"		SW. SW	19	73	"	"	"	35. 17		
NW. NE	33	"	"	"	"	"		SW. NE	1	"	42	"	"	40		
SW. NE	"	"	"	"	"	"		SE. NE	"	"	"	"	"	"		
NE. NW	"	"	"	"	"	"		NW. SW	"	"	"	"	"	"		
NW. NW	"	"	"	"	"	"		SW. SW	"	"	"	"	"	"		
SE. NW	"	"	"	January 30, '71	121	"		NE. SE	"	"	"	"	"	"		
NW. SE	"	"	"	October 20, '69	84½	"		NW. SE	"	"	"	"	"	"		
SW. SE	"	"	"	"	"	"		NE. NE	5	"	"	"	"	37. 14		
SE. SE	1	72	"	"	"	"		NW. NE	"	"	"	"	"	36. 86		
SE. NW	19	"	"	"	"	"		SW. NE	"	"	"	"	"	40		
208 NE. NW	23	72	41	October 20, '69	84½	40		SE. NE	"	"	"	"	"	"		
SE. NW	"	"	"	"	"	"		NE. SW	"	"	"	"	"	"		
NE. SW	"	"	"	"	"	"		SE. NW	"	"	"	"	"	"		
NW. SW	"	"	"	"	"	"		NE. NE	11	"	"	"	"	"		
SW. SW	"	"	"	"	"	"		SE. NE	"	"	"	"	"	"		
SE. SW	"	"	"	"	"	"		NE. SE	"	"	"	"	"	"		
NW SE	"	"	"	"	"	"		SE. SE	"	"	"	"	"	"		
SW. SE	"	"	"	"	"	"		209 NE. NW	19	73	42	Oct. 20, 1869	84½	40		
NE. NE	25	"	"	"	"	"		SE. NW	"	"	"	"	"	"		
NW. NE	"	"	"	"	"	"		NE. NE	25	"	"	Jan. 30, 1871	121	"		
SW. NE	"	"	"	"	"	"		NW. NE	"	"	"	"	"	"		
SE. NE	"	"	"	"	"	"		SW. NE	31	"	"	Oct. 20, 1869	84½	"		
NE. NW	"	"	"	"	"	"		NW. SE	"	"	"	Jan. 30, 1871	121	"		
NW. NW	"	"	"	"	"	"		NE. SW	3	71	43	Oct. 20, 1869	84½	"		
SW. NW	"	"	"	"	"	"		NW. SW	"	"	"	"	"	"		
SE. NW	"	"	"	"	"	"		SE. SW	"	"	"	"	"	"		
NE. SW	"	"	"	"	"	"		SW. SW	9	"	"	"	"	"		
SE. SW	"	"	"	"	"	"		SE. SW	"	"	"	Jan. 30, 1871	121	"		
NE. NE	27	"	"	"	"	"		NE. SW	"	"	"	"	"	"		
NW. NE	"	"	"	"	"	"		NW. SW	"	"	"	"	"	"		
SW. NE	"	"	"	"	"	"		SE. SE	"	"	"	Oct. 20, 1869	84½	"		
SE. NE	"	"	"	"	"	"		NE. NW	11	"	"	"	"	"		

EXHIBIT B.—Continued.

Part of section.	S.	T.	R.	Date of sale.	Kind of sale.	Acres.	Part of section.	S.	T.	R.	Date of sale.	Kind of sale.	Acres.
NW. NW	"	"	"	Jan. 30, 1871	121	"	NE. NW	"	"	"	"	"	"
NW. NW	17	"	"	"	"	"	NW. NW	"	"	"	"	"	"
SW. NW	"	"	"	"	"	"	210 SW. NW	21	72	43	Oct. 20, 1869	84½	40
NE. NE	19	"	"	Oct. 20, 1869	84½	"	SE. NW	"	"	"	"	"	"
NW. NE	21	"	"	"	"	"	NE. SW	"	"	"	"	"	"
NE. NW	"	"	"	"	"	"	NW. SW	"	"	"	"	"	"
SE. NW	"	"	"	"	"	"	SW. SW	"	"	"	"	"	"
NE. NE	29	"	"	"	"	"	SE. SW	"	"	"	"	"	"
NW. NE	"	"	"	Jan. 30, 1871	121	"	NE. SE	"	"	"	Jan. 30, 1871	121	"
SW. NE	"	"	"	"	"	"	NW. SE	"	"	"	"	"	"
SE. NE	"	"	"	Oct. 20, 1869	84½	"	SW. SE	"	"	"	"	"	"
NW. SE	"	"	"	"	"	"	SE. SE	"	"	"	"	"	"
SW. SE	"	"	"	"	"	"	SW. SW	23	"	"	Oct. 20, 1869	84½	"
NW. NE	33	"	"	"	"	"	NE. NE	27	"	"	"	"	"
SW. NE	33	71	43	Jan. 30, 1871	121	40	SW. NE	"	"	"	Jan. 30, 1871	121	"
SE. NE	"	"	"	"	"	"	SE. NE	"	"	"	Oct. 20, 1869	84½	"
SE. NW	"	"	"	Oct. 20, 1869	84½	"	NE. NW	"	"	"	Jan. 30, 1871	121	"
NE. SW	"	"	"	"	"	"	NW. NW	"	"	"	"	"	"
SE. SW	"	"	"	"	"	"	SW. NW	"	"	"	"	"	"
NE. SE	"	"	"	Jan. 30, 1871	121	"	SE. NW	"	"	"	"	"	"
NW. SE	"	"	"	Oct. 20, 1869	84½	"	NE. SW	"	"	"	"	"	"
SW. SE	"	"	"	"	"	"	SW. SW	"	"	"	Oct. 20, 1869	84½	"
SE. SE	"	"	"	"	"	"	SE. SW	"	"	"	Jan. 30, 1871	121	"
NW. NE	5	72	"	"	"	31	NE. SE	"	"	"	Oct. 20, 1869	84½	"
SW. NE	"	"	"	"	"	40	NW. SE	"	"	"	Jan. 30, 1871	121	"
NE. NW	"	"	"	"	"	30. 95	SW. SE	"	"	"	"	"	"
NW. NW	"	"	"	"	"	30. 90	SE. SE	"	"	"	"	"	"
SW. NW	"	"	"	"	"	40	NE. SW	29	"	"	Oct. 20, 1869	84½	"
SE. NW	"	"	"	"	"	"	SE SW	"	"	"	"	"	"
NW. SW	"	"	"	"	"	"	NW. SE	"	"	"	"	"	"
SW. SW	"	"	"	"	"	"	SW. SE	"	"	"	"	"	"
SE. SW	"	"	"	"	"	"	SE. NW	33	72	43	Oct. 20, 1899	84½	40
SW. NW	7	"	"	"	"	41. 51	SW. NW	35	"	"	"	"	"
NE. SE	17	"	"	"	"	40	SE. NW	"	"	"	"	"	"
NE. NW	19	"	"	"	"	"	NE. SE	"	"	"	"	"	"
NW. NW	"	"	"	"	"	40. 22	NW. SE	"	"	"	"	"	"
SW. NW	"	"	"	"	"	40. 09	SW. SE	"	"	"	"	"	"
NE. NE	21	"	"	"	"	40	SE. SE	"	"	"	"	"	"
NW. NE	"	"	"	"	"	"	SE. NE	19	73	"	"	"	"
SW. NE	"	"	"	"	"	"	NW. NE	31	"	"	"	"	"
SE. NE	"	"	"	"	"	"	SW. NE	"	"	"	"	"	"

NW. SE	"	"	"	"	....	"	"	NW. NE	25	"	"	Oct. 20, 1869	84½	"	
SW. SE	"	"	"	"	....	"	"	SW. NE	"	"	"	"	....	"	
NE. NE	1	72	44	"	....	"	"	NE. SW	"	"	"	Jan. 30, 1871	121	"	
SE. NE	"	"	"	"	....	"	"	NW. SE	"	"	"	"	....	"	
Part lot 1, NW. NW	"	"	"	"	....	"	"	NE. NE	13	73	"	Oct. 20, 1869	84½	"	
Lot 2 { SW. NW.	"	"	"	"	....	"	"	211 SE. NE	13	73	44	October 20, '69	84½	40	
Lot 2 { SE. NW	"	"	"	"	....	"	"	NE. SE	"	"	"	"	....	"	
Lot 3 { NE. SW	"	"	"	"	....	"	"	Lot 1. E. h. SE	27	"	"	January 30, '71	121	12. 60	
Lot 3 { NW. SW	"	"	"	"	....	"	"	Lot 1 { NW. NW	35	"	"	October 20, '69	84½	40	
Lot 4 { SW. SW	"	"	"	"	....	"	"	Lot 1 { SW. NW	"	"	"	January 30, '71	121	11. 10	
Lot 4 { SE. SW	"	"	"	Jan. 30, 1871	121	"		Lot 2 { SE. NW	35	73	44	January 30, '71	121 }	53. 04	
NE. SE	"	"	"	Oct. 20, 1869	84½	"		Lot 2 { NE. SW	"	"	"	October 20, '69	84½ }		
SW. SE	"	"	"	Jan. 30, 1871	121	"		Lot 3, Wh. SE	"	"	"	"	....	"	47. 13
NE. SW	13	"	"	"	....	"	"	NE. NW	"	"	"	"	....	"	40

Grand total, 11,492 37 acres, all of which has been certified to the B. & M.

Supplemental List.

Swamp selections quitclaimed by the B. & M. to Mills County, 480 acres, none of which have been certified to the B. & M.

Part of section.	S.	T.	R.	Date of sale.	Kind of sale.	Acres.	Remarks.
SW. SE	19	72	41	October 20, '69	84½	40	App. as swamp Dec. 14, '70; pat. as swamp, pat. No. 9.
SW. SW	3	71	43	"	"	40	App. as swamp June 15, '67; pat. No. 4
NE. NE	9	"	"	"	"	40	" " "
SW. SE	"	"	"	"	"	40	" " "
SW. NW	27	"	"	"	"	40	" " "
SW. SW	"	"	"	"	"	40	" " "
NE. NE	33	"	"	"	"	40	" " "
NE. NW	29	72	"	"	"	40	App. as swamp Dec. 14, '70; pat. No. 9.
SE. NW	"	"	"	"	"	40	" " "
SE. NE	33	"	"	"	"	40	" June 14, '67; pat. No. 4.
NE. SE	"	"	"	"	"	40	" Dec. 14, '70; pat. No. 9.
NE. NW	35	"	"	"	"	40	" " "
						480 acres.	

212 EXHIBIT C.

Swamp lands in Mills County, Iowa, quitclaimed by the B. & M. R. Co., J. N. Denison, or Henry S. Russell to parties holding title from Mills County, in pursuance of the compromise and settlement of 1868.

Part of section.	S.	T.	R.	To whom sold by the R. R. Co.	Date of sale.	Kind of sale.	Acres.
SE. NE	7	72	40	P. P. Johnson	October 17, '72	242	40
N. h. NW	"	"	"	Andrew Wearin	April 12, '71	126	78. 32
NE. SW	"	"	"	P. P. Johnson	October 17, '72	242	40
W. h. SW	"	"	"	Harry Wearin	April 12, '71	127	80. 47
SW. NE	15	73	"	J. J. Ewing	January 28, '73	286	29. 75
NW. SW	31	"	"	Lewis Robbins	February 8, '72	172	40
E. h. NW	15	71	41	Luther R. Martin	February 20, '71		80
NE. SW	"	"	"	Wm. G. Summers	October 21, '73	347	40
W. h. SW	"	"	"	Luther R. Martin	February 21, '71		80
SW. SE	27	"	"	Wm. G. Summers	October 21, '73	347	40
E. h. NE	33	"	"	H. W. Summers	December 14, '71	91	80
NW. SW	"	"	"	"	June 8, '72	192	40
SW. q	13	72	"	Josiah Wearin	January 30, '71	122	160
N. h. NE SW. NE	23	"	"	"	"	"	120
SW. NE	24	"	"	D. N. Smith	January 17, '70	93	40
E. h. SW	1	73	42	H. C. Watkins	"	89	80
NE. NW	31	"	"	D. C. Briggs	"	90	40
SW. q	19	72	43	Geo. D. Humphreys	October 18, '71	144	159. 81
E. h. SE	29	"	"	Thos. B. Gordon	July 7, '73		80
SW. NE	33	"	"	David Remick	September 14, '72	239	40
NW. SE SE. SE	1	"	44	Fred. Plumer	April 30, '72	177	80

213 EXHIBIT D.

Swamp selections quitclaimed by the B. & M., in pursuance of the compromise for the benefit of pre-emptors or purchasers.

Part of Section.	S.	T.	R.	To whom sold by R. R. Co.	Date of sale.	Acres.	Remarks.
NW. NE	29	73	42	Mills County	Jan. 30, '71	40	$100 p'd by G. Plumb.
NE. NW	"	"	"	"	"	"	
SW. NW	"	"	"	"	"	"	$50, A. Emmett.
NE. NW	31	"	"	"	"	"	
NW. NW	"	"	"	"	"	34. 65	$100, V. Plumb.
NE. NE	9	71	41	"	"	40	
NW. NE	"	"	"	"	"	"	$100, H. W. Summers.
NE. NW	"	"	"	"	"	"	
NW. NW	"	"	"	"	"	"	
SW. NW	"	"	"	"	"	"	$200, H. W. Summers.
SE. NW	"	"	"	"	"	"	
NE. SW	"	"	"	"	"	"	
NW. SW	"	"	"	"	"	"	
SW. SW	"	"	"	"	"	"	$200, W. G. Summers.
SE. SW	"	"	"	"	"	"	
NW. NE	27	"	"	"	"	"	
SW. NE	"	"	"	"	"	"	$100, H. H. Woodrow.
NW. SW	29	"	"	"	"	"	
NE. SW	35	72	"	"	"	"	$50, T. D. Davis.
E. h. NW. SW	"	"	"	"	"	20	
NW. SE	"	"	"	"	"	40	$75, W. H. Taft.
SE. NW	9	71	43	"	"	"	$50, I. Meadows.
NE. SW	"	"	"	"	"	"	
NW. SW	"	"	"	"	"	"	$150, John Haynie.
NW. NW	11	"	"	"	"	"	
NW. NW	17	"	"	"	"	"	$50, D. Rhodes.
SW. NW	"	"	"	"	"	"	
NW. NE	29	"	"	"	"	"	$100, A. R. Wright.
SW. NE	"	"	"	"	"	"	
SE. NE	33	"	"	"	"	"	$100, R. Queen.
NE. SE	"	"	"	"	"	"	
SW. NE	27	"	"	"	"	"	$100, Jane Pack.
NE. SW	"	"	"	"	"	"	
NW. SE	"	"	"	"	"	"	$150 John Johnson.
Part lot 4, SE. SW	1	72	44	"	"	"	
SW. SE	"	"	"	"	"	"	$150, J. Barnes.
NE. SW	13	"	"	"	"	"	$50, W. H. Hinton.

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EXHIBIT E.

List of swamp sections on which the B. & M. released tax titles held by J. N. Denison to parties claiming under Mills County, in pursuance of the compromise.

Part of section.	S.	T.	R.	Acres.	
NE. SW	7	72	40	40	P. P. Johnson.
SW. NE	15	73	"	29. 75	J. J. Ewing.
NE. SW	31	"	"	40	Lewis Robbins.
E. h. NW	15	71	41	80	Luther R. Martin.
W. h. SW	"	"	"	80	" "
NE. SW	"	"	"	40	Wm. G. Summers.
SW. SE	27	"	"	40	" "
NW. SW	33	"	"	40	H. W. Summers.
SW. q	19	72	43	159. 81	Geo. D. Humphreys.
E. h. SE	29	"	"	80	T. B. Gordon.
SW. NE	33	"	"	40	David Remick.
NW. SE	1	"	44	40	Fredrich Plumer.
SE. SE	"	"	"	40	" "
				749 56	

EXHIBIT F.

Swamp selections in controversy sold by R. R. Co. subsequent December 31st, 1872.

Part of section.	S.	T.	R.	Acres.	To whom sold by railroad co.	Date of sale.	No. contract.	Total am't of sale.	Am't paid to Jan. 1, '76.	Am't unpaid Jan. 1, '76.	Terms of sale. Time.	Terms of sale. Int.	Date of 1st principal payment.
E. h. NW	5	72	40	66. 80	David Henderson	June 3, '73	2351	$1,068 80		$1,068 80	10 y	6 %	June 3, '77.
E. h. SE	7	"	"	80	Strahan & Evans	Oct. 27, '74	3361	1,280		1,280	"	"	Oct. 27, '78.
SW. q	8	"	"	160	Francis M. Thomas	Sept. 2, '74	3246	2,400		2,400	"	"	Sept. 2, '78.
E. h	18	"	"	320	John Evans, jr	Sept. 1, '74	3124	7,200		7,200	"	"	Sept. 1, '78.
N. h. NE	19	"	"	80	Strahan & Evans	Oct. 27, '74	3362	2,000	$666 66	1,333 34	2 y	10 %	Oct. 27, '74, ⅓.
N. h. SW	9	73	"	80	H. B. Thompson	Dec. 8, '73	2595	1,600		1,600	10 y	6 %	Dec 8, '77.
S. h. SW	"	"	"	80	Wm. McCoy	Nov. 17, '73	2575	1,600		1,600	"	"	Nov. 17, '77.
NW. q	10	"	"	160	John H. Whitside	March 4, '74	2727	2,720		2,720	"	"	March 4, '78.
NW. SE	17	"	"	40	Geo. W. Newman	Jan. 15, '74	2720	520		520	"	"	Jan. 15, '78.
NE. q	21	"	"	160	Strahan & Evans	April 16, '73	2267	3,840		3,840	"	"	April 16, '77.
N. h. SE	"	"	"	80									
S. h. SW	"	"	"	80									
S. h. SE	"	"	"	80									
N. h. sec	28	"	"	320									
N. h. SW	"	"	"	80									
NE. NE	29	"	"	40	Strahan & Evans	June 9, '74	2968	5,760		5,760	10 y	6 %	June 9, '78.
S. h. NE	"	"	"	80									
SE. NW	"	"	"	40									
E. h. SW	"	"	"	80									
SE. q	"	"	"	160									
SW. SW	22	"	"	40	J. H. McCave	Aug. 14, '73	2439	640		640	10 y	6 %	Aug. 14, '67.
NW. SE	"	"	"	40	Wesley Coppock	Feb. 13, '74	2709	600		600	"	"	Feb. 13, '78.
W. h. SE	28	"	"	80	B. F. Pickerill	Aug. 23, '73	2453	1,280		1,280	"	"	Aug. 23, '77.
N. h. NE	31	"	"	80	Norman Curtis	Jan. 10, '74	2636	880		880	"	"	Jan. 10, '78.
SW. NE	"	"	"	40	Lewis Robbins	April 1, '74	2823	440		440	"	"	April 1, '78.
S. h. NW	"	"	"	74. 96	Valentine Plumb	Jan. 26, '74	2654	1,199 36		1,199 36	"	"	Jan. 26, '78.
SW. SW	10	71	41	40	Chas. H. Darlin	Aug. 12, '73	2437	480	160	320	2 y	10 %	Aug. 12, '73, ⅓.
216 SE. SW	15	71	41	40	Corp. N. Mallory	Sept. 5, '73	2481	2,160	2,160		2 y	10 %	
W. h. SE	"	"	"	80									
W. h. NE	28	"	"	80	Eaton Barnes	March 11, '74	2743	1,800		1,800	10 y	6 %	March 11, '78.
SE. NW	"	"	"	40									
W. h. SW	"	"	"	80	Stephen D. Davis	Nov. 7, '74	3421	1,024	682 66	341 34	2 y	10 %	⅓ down.
E. h. SW	29	"	"	80	Stephen D. Davis	Oct 15, '74	3295	2,176	1,450 66	725 34	"	"	"
W. h. SE	"	"	"	80									
SE. NE	32	"	"	40	B. W. Sherman	Nov. 4, '74	3392	600		600	10 y	6 %	Nov. 4, '78.
E. h. SW	33	"	"	80	Warren L. Roll	Oct. 1, '73	2521	1,280		1,280	"	"	Oct. 1, '77.
SW. SW	"	"	"	40	W. & E. Antrim	June 21, '73	2390	640		640	"	"	June 21, '77.
S. p't NE. SW	24	72	"	34. 50	Wm. Wheeler	Dec. 18, '74	3539	828	828		2 y	10 %	All paid.

NE. q	26	"	"	160	Josiah Wearin	May	5, '74	2868	2,048	1,365 34	682 66	"	"	½ down.
N. h. SE	"	"	"	80	Wm. Wheeler	Dec.	16, '74	3531	1,344	448	896	"	"	"
SW. SE	"	"	"	40										
SW. SE	1	71	43	40	Rufus L. Merritt	Dec.	17, '74	3532	320	.....	320	10 y	6 %	Dec. 17, '78.
SW. NE	34	"	"	40	Jesse Buckingham	Dec.	24, '73	2607	200	200	.....	2 y	10 %	½ down.
NW. NW	"	"	"	40	Benj. Buckingnam		"	2608	600	600	.....	"	"	"
NW. SE	"	"	"	40	Adam Focht	Nov.	18, '73	2576	400	.....	400	10 y	6 %	Nov. 18, '77.
SW. SE	35	"	"	40	R. H. Coster	Nov.	9, '74	3417	240	160	80	2 y	10 %	½ down.
SE. NW	19	72	"	40	Flagg A. Nye	Aug.	9, '75	4186	668	.....	668	10 y	6 %	Aug. 9, '79.
SE. SW	26	"	"	40	Andrew Kretz	Dec.	6, '73	2592	680	.....	680	"	"	Dec. 6, '77.
W. h. NW	29	"	"	80	Abram Sherman	Oct.	2, '74	3334	1,200	.....	1,200	"	"	Oct. 2, '78.
W. h. NW	33	"	"	80	Hiram M. Lewis	Sept.	29, '74	3259	1,155 20	.....	1,155 20	"	"	Sept. 29, '78.
S. h SE	"	"	"	80	John Carter	Nov.	16, '74	3777	1,280	.....	1,280	"	"	Nov. 16, '78.
NW. NW	35	"	"	40	H. C. Watkins	June	2, '74	2937	800	.....	800	"	"	June 2, '78
E. h SW	17	73	"	80	Wm. R. Wall	Nov.	16, '74	3432	600	100	500	2 y	10 %	Nov, 16, '74.
W. h. NE	1	72	44	71. 04	Bernard Glenn	June	22, '74	2980	497 28	.....	497 28	10 y	6 %	June 2, '78.
EE. NE	12	"	"	40	Thos. J. Baldwin	Dec.	16, '74	3530	400	.....	400	"	"	Dec. 16, '78.
NW. SE	13	"	"	40	Hiram Hiles	July	12, '75	4159	440	.....	440	"	"	July 12, '79.

EXHIBIT G.

Swamp selections in controversy, sold by the railroad company prior to December 31st, 1872.

Part of section.	S.	T.	R.	Acres.	To whom sold by railroad co.	Date of sale.	No. of contract.	Total am't of sale.	Am't paid to Jan. 1, '79.	Am't unpaid Jan. 1, '76.	Terms of sale. Time.	Terms of sale. Int.	Date of 1st principal payment.
NE. NE	5	72	40	26.44	Chas. Purcell	Nov. 3, '70	1237	$423 04	$141 01	$282 03	10 y	6 %	Nov. 3, '72.
W. h. NE	"	"	"	66.68	J. O. Munson	Sept. 5, '70	1001	1,666 88	355 63	711 25	"	"	Sept. 5, '72.
NE. NE	7	"	"	40	Samuel Pursell	May 11, '70	984	800	266 67	533 33	"	"	May 11, '72.
N. h. NW	"	"	"	78.32	Andrew Wearin	April 12, '71	Q. C.	97 90	97 90	Q. C. per comp'm ise			
W. h. SW	"	"	"	80.47	Harry Wearin	" "	"	100	100 59	"			
E. h. NE	17	"	"	80	Henry Fisher	Aug. 12, '72	2013	1,600	177 78	1,422 22	10 y	6 %	Aug. 12, '74.
E. h. NE	4	73	"	75.94	Peter Eckley	May 27, '72	1936	1,063 16	236 26	826 90	"	"	May 27, '74.
SE. q	"	"	"	160	"	May 29, '71	1557	2,560	284 44	2,275 56	"	"	May 29, '73.
W. h. NE	9	"	"	80	"	June 4, '72	1981	1,280	.....	1,280	"	"	June 4, '74.
W. h. SW	14	"	"	40	H. E. Perry	Oct. 28, '70	1225	1,360	604 45	755 55	"	"	Oct. 28, '72.
SE. NE	20	"	"	40	Geo. Plumb	Oct. 26, '70	1174	1,152	1,152	.....	2 y	10 %	½ down.
E. h. SE	"	"	"	80									
SE. NW	11	71	41	40	Samuel Star	Dec. 17, '63	35	50	50	.....	.....	.....	
SE. SW	15	"	"	40	I. L. McCoy	May 23, '71	1543	2,400	200	2,200	2 y	0 %	
W. h. SE	"	"	"	80									
SE. SE	31	"	"	40	Geo. S. Wilson	Oct. 17, '71	1766	1,000	333 33	666 67	10 y	6 %	Cancelled and resold.
SW. q	32	"	"	160	Frank Hobbs	March 16, '71	1384	3,200	.....	3,200	"	"	Oct. 17, '73.
SE. q	"	"	"	160	"	" "	1385	2,240	.....	2,240	"	"	March 16, '73.
E. h. NE	33	"	"	80	H. W. Summers	Dec. 14, '71	Q. C.	100	100	Q. C. per comp'm ise			"
NW. SW	"	"	"	40	"	April 22, '72	"	Per comp.; nothing paid.					
E. h. SE	"	"	"	80	"	Aug. 29, '71	1691	1,520	337 78	1,182 22	10 y	6 %	Aug. 29, '73.
SW. q	13	72	"	160	Josiah Wearin	Jan. 30, '71	Q. C.						
N. h. NE	23	"	"	80	"	" "	"	500	500	P'r special contract.			
SW. NE	"	"	"	40	"	" "	"						
SW. NE	24	"	"	40	D. N. Smith	Jan. 17, '70	"	50	50	Q. C. per comp'm ise.			
NW. NE	1	73	42	34.80	S. G. Sidener	Oct. 29, '70	1207	522	116	406	10 y	6 %	
E. h. SW	"	"	"	80	H. C. Watkins	Jan. 17, '70	Q. C.	100	100	Q. C. pe comp'm ise.			
218 NW. NW	13	73	42	40	D. Cavanaugh	June 17, '71	1594	880	293 34	586 66	10 y	6 %	Oct. 29, '72.
W. h. NE	19	"	"	80	Fred. Choming	June 27, '71	1602	1083	1,088	.....	2 y	10 %	June 17, '73.
SE. SW	"	"	"	40	F. M. Buffington	Oct. 24, '70	1159	608	608	.....	Cash	.....	
W. h. SE	"	"	"	80	Ludwig Hansen	June 28, '71	1607	1,200	266 67	933 33	10 y	6 %	June 28, 73.
NE. NW	31	"	"	40	D. C. Briggs	Jan. 17, '70	Q. C.	50	50	Q. C. per compm' ise			
E. h. NW	1	71	43	69.84	Thomas Wills	July 15, '64	56	87 30	87 30	.....	.....	.....	
W. h. NW	"	"	"	69.62	A. H. Burger	" "	57	87	87	.....	.....	.....	
W. h. NE	3	"	"	67.86	Wm. E. Dean	Jan. 30, '64	47	85	85	.....	.....	.....	
SW. NE	5	"	"	40	Edward Weeks	Oct. 27, '63	25	50	50	.....	.....	.....	
SE. NE	"	"	"	"	Wm. Trisler	" "	26	50	50	.....	.....	.....	
NE. SE	"	"	"	"	T. S. Crewdsen	" "	27	50	50	.....	.....	.....	

NW. SE	"	"	"	"	Lucinda Wilson	Dec.	7, '63	54	50	50				
S. h. SE	"	"	"	80	D. H. Epperson and Wm. Jones	Jan.	30, '64	34 50	100	100				
NE. SW	17	"	"	40	P. L. Delashmut	Jan.	29, '64	49	150	150				
N. h. SE	"	"	"	80	"	"	"							
W. h. SW	"	"	"	"	Isom S. Wright	Nov.	6, '71	1783	1, 680		1, 680	10 y	6 %	Nov. 6, '73.
SE. SW	"	"	"	30	John L. Buell	Aug.	26, '71	2004	1, 088	362 67	725 33	2 y	10 %	½ down.
SW. SE	"	"	"	"	"	"	"							
SE. SE	"	"	"	"	Lyman Cutler	Oct.	'27, 63	30	50	50				
SW. NW	21	"	"	"	T. S. Crewdsen	Oct.	27, '63	31	100	100				
NW. SW	"	"	"	"	"	"	"							
SW. SW	"	"	"	"	A. P. Cutler	Jan.	29, '64	34	50	50				
SE. SE	29	"	"	"	James Queen	Oct.	27, '63	32	50	50				
W. h. SW	"	72	"	80	Giles Hinson	Oct.	16, '72	2122	1, 200	266 66	933 34	10 y	6 %	Oct. 16, '74.
E. h. NW	17	73	"	"	Otis E. Allis	June	29, '71	1608	1, 280	429 66	853 34	"	"	June 29, '73.
E. h. SW	"	"	"	"	J. T. Hamilton	June	27, '71	1603	960		960	"	"	C'n'led and resol'd.
NE. NW	20	"	"	40	S. L. Fletcher	Dec.	23, '71	1816	480		480	"	"	Dec. 26, '73.

EXHIBIT L.

Swamp selections quit-claimed by the B. & M., in pursuance of the compromise for the benefit of pre-emptors or purchasers, on which the B. & M. received the purchase money.

Part of section.	S.	T.	R.	To whom sold by the R. R. Co.	Date of sale.	Kind of sale.	Acres.	Remarks.
N. h. NW	7	72	40	Andrew Wearin	April 12, '71	Q. C.	78.32	$97 90 paid B. & M. by A. Wearin.
W. h. SW	"	"	"	Harry Wearin	"	"	80 47	100 59 " " H. Wearin.
NW. NE NE. NW	29	73	"	Mills County	January 30, '71	.....	80	100 " " Geo. Plumb.
SW. NW	"	"	"	"	"	.....	40	50 " " Alf. Emmett.
N. h. NW	31	"	"	"	"	.....	74.65	100 " " V. Plumb.
N. h. NE	9	71	41	"	January 30, '71	.....	80	100 " " H. W. Summers.
NW. q	"	"	"	"	"	.....	160	200 " " "
SW. q	"	"	"	"	"	.....	160	200 " " W. G. Summers.
W. h. NE	27	"	"	"	"	.....	80	100 " " H. H. Woodrow.
NW. SW	29	"	"	"	"	.....	40	50 " " S. D. Davis.
E. h. NE	33	"	"	H. W. Summers	December 14, '71	Q. C.	80	100 " " H. W. Summers.
NE. SW	35	72	"	Mills County	January 30, '71	.....	40	75 " " W. H. Taft.
E. h. NW. SW	"	"	"	"	January 17, '70	.....	20	
E. h. SW	1	73	42	H. C. Watkins	"	Q. C.	80	100 " " H. C. Watkins.
NE. NW	31	"	"	D. C. Briggs	January 30, '71	"	40	50 " " D. C. Briggs.
NW. SE	"	"	"	Mills County	"	.....	40	50 " " Isaac Meadows.
SE. NW	9	71	43	"	"	.....	40	
N. h. SW	"	"	"	"	"	.....	80	150 " " John Haynie.
NW. NW	11	"	"	"	"	.....	40	50 " " Dan'l Rhodes.
W. h. NW	17	"	"	"	"	.....	80	100 " " A. R. Wright.
W. h. NE	29	"	"	"	"	.....	80	100 " " Reuben Queen.
SE. NE	33	"	"	"	"	.....	40	
NE. SE	"	"	"	"	"	.....	40	100 " " Jane Pack.
SW. NE. NE. SW. NW. SE.	27	27	"	"	"	.....	120	150 " " John Johnson.
220 Part lot 4, SE. SW	1	72	44	Mills County	January 30, '71	.....	40	
SW. SE	"	"	"	"	"	.....	40	$100 paid B. & M. by Julius Barnes
NE. SW	13	"	"	"	"	.....	40	$50 paid B. & M. by W. H. Hinton.

EXHIBIT M.

List of swamp selections in controversy, upon which the B. & M. holds tax titles or certificates of tax sales, or both:

Part of section.	S.	T.	R.	Acres.	To whom sold by railroad co.	Date of sale.	No. contract.	Date of sale for taxes.	Am't tax sale, subseq't taxes.	Date of record of tax deed.	Holder of tax deed or tax certificate.
SW. SW	5	72	40	40							
NW. SW	22	73	"	"	Wesley Coppock	Feb. 13, '74	2709	Oct. 3, '64	11 71	May 1, '69	J. N. Denison, for C., B. & Q.
SE. SW	15	71	41	"					5 36	Oct. 25, '73	C., B. & Q. R. R. Co.
NW. SE	"	"	"	"	Corp'n N. Mallory	Sept. 5, '73	2481	Oct. 3, '64	17 13	May 1, '69	J. N. Denison, for C., B. & Q.
					" "	" "	"	Oct. 2, '71	18 65		H. S. Russell " "
SW. SE	"	"	"	"				Oct. 3, '64	16 88	"	J. N. Denison " "
					" "	" "	"	Oct. 2, '71	18 30	"	H. S. Russell " "
NW. SE								Oct. 3, '64	16 89	"	J. N. Denison " "
SW. SE	1	"	43	40				Oct. 2, '71	18 30	"	H. S. Russell " "
NE. NW	"	"	"	"				Oct. 3, '64	13 62		J. N. Denison " "
NW. NW	5	"	"	25. 82	Rufus L. Merritt	Dec. 17, '74	3532	"	13 62	"	" " "
SW. NW	"	"	"	25. 67				"	15 36	"	" " "
SE. NW	"	"	"	40				"	11 84	"	" " "
NW. SW	"	"	"	"				"	11 84	"	" " "
221 SW. SW	17	"	"	"				"	15 36	"	" " "
SE. SW	17	71	43	40	Isom S. Wright	Nov. 6, '71	1783	"	17 25	"	" " "
SW. SE	"	"	"	"	Isom S. Wright	Nov. 6, '71	1783	Oct. 3, '64	14 46	May 1, '69	J. N. Denison, for C., B. & Q.
NW. NW	29	72	"	"	John L. Buell	Aug. 26, '71	2004	"	14 44	"	" " "
					" "	" "	"	"	14 61	"	" " "
SW. NW	"	"	"	"	Abram Sherman	Oct. 2, '74	3334	Oct. 3, '64	22 69	May 1, '69	H. S. Russell, for C., B. & Q.
					" "	" "	"	Oct. 2, '71	25 62	"	J. N. Denison " "
NE. NE	31	"	"	"				Oct. 3, '64	22 68	"	H. S. Russell " "
								Oct. 2, '71	25 62	"	C., B. & Q. R. R. Co.
SE. NE	"	"	"	"				Oct. 3, '64	31 17	"	H. S. Russell, for C., B. & Q.
								Oct. 2, '71	4 69	"	C., B. & Q. R. R. Co.
NE. SE	"	"	"	"				Oct. 3, '64	31 17	"	H. S. Russell, for C., B. & Q.
								Oct. 2, '71	4 69	"	C., B. & Q. R. R. Co.
SE. SE	"	"	"	"				Oct. 3, '64	36 64	"	H. S. Russell, for C., B. & Q.
								Oct. 2, '71	4 70	"	C., B. & Q. R. R. Co.
NW. NE								Oct. 3, '64	30 65	"	H. S. Russell, for C., B. & Q.
NE. NW	33	"	"	"				Oct. 2, '71	4 70	"	C., B. & Q. R. R. Co.
NW. NW	"	"	"	"				Oct. 3, '64	19 98		H. S. Russell, for C., B. & Q.
SW. NW	"	"	"	"	H. M. Lewis	Sept. 29, '74	3259	"	19 56	May 1, '69	J. N. Denison " "
SW. NE	"	"	"	"	" "	" "	"	"	19 56	"	" " "
	31	"	"	"				"	20 61	"	" " "
								"	18 80	"	" " "

222 II. Deposition of C. E. PERKINS. (Transcript, 929.)

In July, 1868, I was superintendent of the B. & M. R. R. Co., and ceased to act in that capacity on the 31st of December, 1872. I signed, on the part of the B. & M. R. R. Co., the original proposition made by the county. (Abstract, p. 21.) That proposition was made to me as resident agent of the company. I don't know anything of the making of the proposition by Mills County to the B. & M. R. R. Co. for the purpose of compromising a suit then pending in the Supreme Court of the United States between said railroad company and Mills County before that time. I remember nothing having been done by the company to bring about that proposition, but it is possible that I may be mistaken. At the time said proposition was made the road was completed to a point somewhere between Osceola and Afton. The surveys made from that point to the Missouri River prior to the submission of said proposition were for the purpose of determining the location of the road, and those made through Mills County were for the same purpose, and none other, and those made from Red Oak, or near that place, to Council Bluffs, were made for no other purpose. No lines were run west of Red Oak for the purpose of exciting the fears of the people of Mills County, or of inducing them to submit a proposition to the company. I never heard of any such thing. No scare or mock lines were run west of Red Oak for the purpose named; none that I know of. I don't know of any action taken by the company concerning the lawsuit that was then pending. The two principal reasons why the road was built through Mills County, and through Glenwood, were in order that we might utilize and secure the Nebraska land grant which had been made to the company, and that we might drain a wider country than we should if we built to Council Bluffs direct from Red Oak. It is impossible to estimate exactly and precisely what weight this proposition had in inducing the company to build its line through Red Oak and Mills County. I am unable to say now whether the company had determined to go through to Plattsmouth before this proposition was made or afterwards. The weight,

223 however, of this proposition would have been very slight in any event, as compared with the importance of building the line so as to connect with the Nebraska extension and of draining the widest country possible; in other words, this proposition from the county would not have determined the company in building to Plattsmouth if there had been no other inducements; my belief is it would not. The proposition was delivered to me at my office in the city of Burlington. I have no recollection of having had anything to do with arranging its terms. I can't state exactly when I first heard that a decree had been rendered in the suit pending in the Supreme Court of the United States, but it was after we had built the road.

Q. Can you state what the principal inducement was which led the company to accept that proposition?

(Objected to by plaintiff at the taking, and also at the hearing, as incompetent, irrelevant, and immaterial. No ruling.)

A. To compromise the lawsuit. I know of no other.

Cross-examination:

I mean to state that there was no other that I know of, and I think there was none that I did not know. I presume I knew the terms of the contract. I signed it. I do not know of any of the inducements that were

offered to Mills County to make this contract; it is possible that I may have at the time; I have no recollection of it. I have no recollection of the railroad company offering to build their railroad through Mills County via Glenwood, and to build a depot at Glenwood as an inducement for the contract. I am aware that such conditions are in the contract as a part of it, and I know that it provided that the suit then pending should be continued from term to term until the contract should be complied with, and I know that the proposition contained in the contract was not to be binding on Mills County unless the company should build its road through Mills County via Glenwood, and build a depot at Glenwood, and that in the event of the neglect or failure of the company so to do that the suit should stand for final hearing in the Supreme Court the same as if the contract had not been made. I said, in examination-in-chief, that the contract was a final settlement of the suit, provided we went on and complied with that condition; if
224 I have said anywhere otherwise I did not mean it; what I meant to be understood as saying was that it was a final settlement, provided both parties went on and complied with the contract. I don't know of any other considerations between the parties outside of the contract itself. I have been railroading some time, and know something of the object of railroad companies running lines, and have heard of railroad companies running lines for other purposes than that of finding a line for their road, but don't think my company has since I came here. From my experience in railroading I would say that the effect of running several divergent lines, upon the people along those lines, would be to stir up strife and emulation between those lines. I can't tell what lines the company did run; can't tell between what points either; can't give the time when they were run. The records are burnt up, and I don't know that they would show it either. I am now a director in the consolidated lines, the B. & M. and the C., B. & Q. Co.'s. There were lines run from Red Oak toward Council Bluffs but whether they were run into the Bluffs or not I am unable to state. I suppose I did know at the time the proposition was made to me here in Burlington that the object of the committee and the object of the board of supervisors in making this proposition was to secure this line through Mills County and a depot at Glenwood, and that they were actuated in making this offer through a fear that if they did not make it we would go elsewhere, and that this was one of the inducements for making the offer. I must have known at the time that that was one of the objects that the committee and board had in view; the contract itself says so.

Redirect examination:

I suppose the B. & M. R. R. Co. continued to dispose of the lands after December 31st, 1872, because no formal transfer had been made to the C., B. & Q. R. R. Co. The line was run from Red Oak towards Council Bluffs for the purpose of determining its feasibility and cost; it was not run as a scare line for the purpose of exciting the fears of the people of Mills County with regard to the final location of the road. About that time an influential party in the board of directors suggested the con-
225 struction of the road direct from Red Oak to Council Bluffs. I was opposed to it for two reasons: First, that it would bring us nearer to the Rock Island road, and limit the country tributary to our road

and, second, that it would prevent our making use of the land-grant in Nebraska by an extension from Plattsmouth west. The arguments in favor of the line to Plattsmouth prevailed. At the time the proposition was accepted, and up to the time that the decision in the Fremont County case was announced, it was my expectation that we should succeed in the suit; and after the proposition was accepted the company went on in the execution of the same; and my recollection is that D. N. Smith was appointed on the part of the company to attend to the land matters.

Recross-examination:

Q. State now, Mr. Perkins, what effect, if any, this proposition, through the agents of Mills County, had upon your company as an inducement to build their road through Mills County and locate a depot at Glenwood.

A. I think the effect was very slight, and that the road would have been built there anyway on other considerations. My interest in the result of this suit is that of a small stockholder; I have 300 shares, worth $100 each.

Redirect examination:

Q. You stated on cross-examination that the inducement on the part of the company to build their road through Mills County afforded by the contract was very slight. I will get you to state whether or not the principal inducement in that matter was to compromise the litigation then pending.

A. It was the only inducement we had to compromise the litigation.

III. Deposition of W. W. PEET. (Transcript, p. 953.)

I have charge of tax matters in the land department of the C., B. & Q. R. R. Co. I superintend the payment of taxes on lands and keep a record thereof.

Q. Take this list and examine it (here witness was handed a paper
226 which is hereto attached, marked "Exhibit A") and state whether you have paid the taxes for 1874 on the same, and give all the particulars.

(To which question the pl'ff at the taking objected as incompetent, irrelevant, and immaterial, and the same objections were renewed on the trial. No ruling by district court.)

A. I will state that I did not pay the taxes for the year 1874 on the lands embraced in this list, but I tendered to Wm. Hock, treasurer of Mills County, on the 9th of April, 1875, $514.13, in the legal currency of the United States in payment of the taxes for the year 1874, due on these lands, together with the accrued interest, and the treasurer refused to issue receipts in the ordinary form; I ascertained that this was the correct amount from the treasurer; I made the tender on behalf of the C., B. & Q. Co., and so stated to the treasurer; I did not pay the taxes for 1874, on the lands described in Exhibit B hereto attached, but did on the 2d of November, 1875, tender to the treasurer of Mills County, in legal currency of the United States, $345.61, but he refused to execute to me the receipts in regular form, and on the same day I tendered to the treasurer the further sum of $375.49, being the amount of taxes due on the list of lands for the year 1874, described in Exhibit C hereto annexed, but he refused to execute to me receipts in the ordinary form; in each

case I tendered the money, and asked the treasurer to take it, and to execute me, as agent of the company, the tax receipts, which I presented in the ordinary form.

Cross-examination:

I left no money with treasurer on either of these occasions; when he refused to give me the receipts I demanded I took the money away with me; when I offered to pay, he said he would "take the money, and here are your receipts;" the receipts were not in the usual form; I demanded receipts without any qualification; the receipts offered me by the treasurer had these words added, "Received under protest; the board of supervisors has ordered me not to collect the above tax;" these were the only objectionable things in the receipts; the receipts were not in the usual form, except the above words; he told me he would receive the
227 money, with the fact that the money was received under protest noted on the receipts.

Redirect examination:

On each occasion referred to in my examination in chief, before leaving the office, I told the treasurer that the railroad company was ready to pay the taxes at any time on delivery of tax receipts in the ordinary form.

Recross-examination:

I reported the facts above detailed to the railroad company soon after my return from Glenwood on each occasion.

228 EXHIBIT A.

List of unsold lands Nov. 1st 1874, belonging to the C., B. & Q. R. R. Co. onwhich taxes for 1874 were levied by Mills County, and on which taxes for 1874 were tendered to Wm. Hoch, treasurer of said county, by said company April 9th, 1875, amounting to $514.13.

Part of section.	S.	T.	R.	Acres.	Total tax.	Part of section.	S.	T.	R.	Acres.	Total tax.
SW. SW	5	72	40	40	$4 40	NW. SE	3	71	43	40	$6 40
NE. SW	6	"	"	"	4 40	SW. SE	"	"	"	"	6 40
NW. SW	"	"	"	37. 04	4 07	SE. SE	"	"	"	"	2 80
SW. SW	"	"	"	37. 64	4 10	NE. NE	4	"	"	27. 43	1 92
SE. SW	"	"	"	40	4 40	NW. NW	"	"	"	26. 33	1 33
SW. SE	"	"	"	"	4 40	SW. SE	"	"	"	40	2 06
SE. SE	"	"	"	"	4 40	SE. SE	"	"	"	40	2 06
SW. NW	7	"	"	39. 09	4 29	NE NW	5	"	"	25. 82	1 34
SE. NW	"	"	"	40	4 40	NW. NW	"	"	"	25. 67	1 34
W. h. SW. NE	2	71	41	20	2 70	SW. NW	"	"	"	40	2 04
SW. SW	"	"	"	40	5 40	SE. NW	"	"	"	"	3 42
SW. SE	9	"	"	"	5 84	NW. NE	9	"	"	"	2 06
SE. SE	"	"	"	"	5 84	NE. NW	"	"	"	"	1 99
NE. NW	11	"	"	"	5 41	NW. NW	"	"	"	"	1 99
NW. NW	"	"	"	"	5 41	NE. NW	10	"	"	"	7 20
NW. NW	15	"	"	"	5 84	SE. NW	"	"	"	"	7 20
SW. NW	"	"	"	"	5 84	NE. NE	18	"	"	"	2 76
NW. SW	28	"	"	"	5 20	NE. SE	20	"	"	"	3 10
SW. SW	"	"	"	"	5 20	NW. SE	"	"	"	"	3 10
SE. NE	32	"	"	"	5 20	SE. SE	"	"	"	"	2 48
NW. SE	13	72	"	"	2 64	NW. NW	28	"	"	"	2 08
SW. SE	"	"	"	"	2 64	SW. NW	"	"	"	"	2 08
SE. NE	23	"	"	"	3 30	NW. SW	"	"	"	"	2 08
NW. NE	24	"	"	"	3 28	NE. SE	29	"	"	"	1 90
NW. NW	"	"	"	"	3 28	NE. SE	32	"	"	"	2 16
SW. NW	"	"	"	"	2 48	SE. SE	"	"	"	"	2 16
SE. NW	"	"	"	"	2 48	NE. SE	34	"	"	"	1 35
NE. SW	"	"	"	"	3 02	SE. SE	"	"	"	"	1 08
NW. SW	"	"	"	"	3 02	NW. SW	35	"	"	"	1 16
NE. SE	26	"	"	"	3 44	SW. SW	"	"	"	"	1 16
NW. SE	"	"	"	"	3 44	SE. SW	"	"	"	"	1 08
SW. SE	"	"	"	"	3 44	SW. SE	"	"	"	"	2 48
NW. SW	1	71	43	"	2 40	NE. NE	5	72	"	31. 03	1 96
SW. SW	"	"	"	"	2 40	NE. SW	17	"	"	40	4 90

Part of section.	S.	T.	R.	Acres.	Total tax.	Part of section.	S.	T.	R.	Acres.	Total tax.
NW. SE	"	"	"	"	2 37	NW. SW	"	"	"	"	"
SW. SE	"	"	"	"	2 37	SW. SW	"	"	"	"	"
NE. NW	2	"	"	28. 58	2 57	SE. SW	"	"	"	"	"
NW. NW	"	"	"	28. 25	2 57	NW. SE	"	"	"	"	"
SW. NW	"	"	"	40	3 60	SW. SE	"	"	"	"	"
NE. NE	3	"	"	27. 98	2 39	SE. SE	"	"	"	"	"
SE. NE	"	"	"	40	3 37	SE. NW	19	"	"	"	"
NE. NW	"	"	"	27. 75	2 30	NE. NE	20	"	"	"	"
NW. NW	"	"	"	27. 65	2 29	NW. NE	"	"	"	"	"
SW. NW	"	"	"	40	3 17	SW. NE	"	"	"	"	"
SE. NW	"	"	"	"	3 17	SE. NE	"	"	"	"	"
229 NE. SE	"	"	"	"	2 80	NE. NW	"	"	"	"	"
NW. NW	20	72	43	40	4 00	SW. SW	33	72	43	40	$7 20
SW. NW	"	"	"	"	4 90	SE. SW	"	"	"	"	7 20
SE. NW	"	"	"	"	4 90	SW. SE	"	"	"	"	4 90
NE. SW	"	"	"	"	4 90	SE. SE	"	"	"	"	4 90
NW. SW	"	"	"	"	4 90	NE. SW	17	73	"	"	2 80
SW. SW	"	"	"	"	4 90	SE. SW	"	"	"	"	2 80
SE. SW	"	"	"	"	4 90	NW. NE	18	"	"	"	1 09
SE. SE	"	"	"	"	4 90	SW. NE	19	"	"	"	1 48
NW. SW	27	"	"	"	7 34	NW. NW	"	"	"	40. 30	1 30
NE. NE	29	"	"	"	2 94	SW. NW	20	"	"	40	2 58
NW. NE	"	"	"	"	2 94	SE. NW	"	"	"	"	2 58
SW. NE	"	"	"	"	2 94	NW. SW	"	"	"	"	4 60
SW. SE	30	"	"	"	2 94	SW. SW	"	"	"	"	4 60
NE. NE	31	"	"	"	2 70	NE. NE	30	"	"	"	1 24
NW. NE	"	"	"	"	2 70	SW. NE	"	"	"	"	1 24
SW. NE	"	"	"	"	2 70	NE. SW	"	"	"	"	1 24
SE. NE	"	"	"	"	2 70	NE. NE	12	72	44	"	1 96
NE. SE	"	"	"	"	2 94	NE. NW	"	"	"	"	1 25
NW. SE	"	"	"	"	2 94	SE. NW	"	"	"	"	1 25
SW. SE	"	"	"	"	2 94	SE. SW	"	"	"	"	1 25
SE. SE	"	"	"	"	2 94	SW. SE	"	"	"	"	1 25
NW. NW	32	"	"	"	2 94	NW. NE	13	"	"	"	1 96
SW. NW	"	"	"	"	2 94	SW. NE	"	"	"	"	1 96
SE. SW	"	"	"	"	2 94	NE. NW	"	"	"	"	1 96
NE. NE	35	"	"	"	9 80	NW. SE	"	"	"	"	2 94
NW. NE	"	"	"	"	4 90	NE. NE	36	"	"	"	2 94
NE. NW	"	"	"	"	4 90	NE. SE	"	"	"	"	2 80
NW. SW	"	"	"	"	7 20	NE. NE	"	73	"	"	1 04
						Total					$14 13
						Deduct for SE. NE. 5,72,42, not swamp land					2 94
											$511 19

Amont due, $521. 41

230

EXHIBIT B.

List No. 1, *showing lands upon which the taxes of* 1874 *were unpaid November* 2*d*, 1875, *and on which the sum of* $545.66 *was tendered in payment of same.*

Part of section.	S.	T.	R.	Taxes levied.	Part of section.	S.	T.	R.	Taxes levied.
NE. NE	7	72	40	$12 60	E. h. SW	33	71	41	$8 00
SE	4	73	"	32 90	NE	26	72	"	10 56
W. h. NE	9	"	"	7 52	N. h. SE	"	"	"	6 88
SW	"	"	"	21 31	SW. SE	"	"	"	3 44
NW	10	"	"	17 28	NW. NE	1	73	42	6 02
S. h. SW	21	"	"	7 68	E. h. NE	1	71	43	4 16
S. h. SE	"	"	"	7 68	W. h. SW	17	"	"	6 57
SW. SW	22	"	"	5 80	SE. SW	"	"	"	2 76
W. h. SE	28	"	"	12 20	SW. SE.	"	"	"	2 76
NE. NE	31	"	"	2 72	SW. NE	34	"	"	1 24
W. h. NE	"	"	"	5 44	NW. NW	"	"	"	2 48
S. h. NW	"	"	"	6 60	NW. SE	"	"	"	1 35
SW. SW	10	71	41	5 85	SW. SE	35	"	"	2 48
W. h. SW	28	"	"	10 40	SE. SW	26	72	"	3 96
SE. SE	31	"	"	5 33	W. h. NW	29	"	"	5 88
SE. NE	32	"	"	5 20	W. h. NW	33	"	"	9 80
S. h	"	"	"	45 28	NE. NW	20	73	"	2 80
									$292 93
					Accrued interest (18 per cent.)				52 73
					Total tendered				$345 66

231 EXHIBIT C.

List No. 2, showing lands upon which purchasers from the R. R. Co. had offered to pay the taxes for 1874, and had received from the county treasurer receipts with the words "Received under protest" added to such receipt, and on which the sum of $375.49 was tendered Nov. 2, 1875.

Part of section.	S.	T.	R.	Taxes levied.	Part of section.	S.	T.	R.	Taxes levied.
N. h. NE	5	72	40	$10 75	E. h. SW	29	73	40	$7 04
SW. NE	"	"	"	3 60	SE	"	"	"	10 88
E. h. NW	"	"	"	7 37	SE. SW	15	71	41	4 64
E. h. SE	7	"	"	8 80	W. h. SE	"	"	"	9 72
SW	8	"	"	17 60	W. h. NE	28	"	"	10 46
E. h. NE	17	"	"	9 00	SE. NW	"	"	"	4 00
N. h. NE	19	"	"	6 56	E. h. SW	29	"	"	10 40
E. h. NE	4	73	"	8 93	W. h. SE	"	"	"	10 40
W. h. SW	14	"	"	17 28	SW. SW	33	"	"	5 20
NW. SE	17	"	"	3 52	E. h. SE	"	"	"	11 34
N. h. NE	21	"	"	9 60	NW. NW	13	73	42	8 94
S. h. NE	"	"	"	9 60	W. h. SE	19	"	"	10 40
N. h. SE	"	"	"	7 68	W. h. SW	29	72	43	5 88
N. h	28	"	"	43 92	E. h. NW	17	73	"	12 00
N. h. SW	"	"	"	9 76	E. h. SW	"	"	"	3 20
NE. NE	29	"	"	2 72	W. h. NE	1	72	44	4 29
S. h. NE	"	"	"	6 24	NW. NW	35	"	43	3 77
SE. NW	"	"	"	2 72					
									$318 21
Accrued interest, (18per c't.)									57 28
Total amount tendered									$375 49

232 IV. Deposition of A. E. TOUZALIN (Transcript, p. 962):

I have been land commissioner of the C. B. & Q. R. R. Co. for a year and a half; from Dec. 31st, 1872, to Jan. 31st, 1875, the lands have been disposed of in the name of the B. & M. R. R. Co., but for the benefit of the C., B. & Q. R. R. Co., and the moneys received have come into the hands of the treasurer of the latter company; on December 31st, 1875, the B. & M. R. R. Co. gave the C., B. & Q. R. R. Co. a perpetual lease of its assets, including lands; the lease looks forward to an absolute transfer and deed to be made, which was made July 31st, 1875; since that date the business has been done in the name of the C., B. & Q. R. R. Co.; the paper now shown me, Exhibit A, hereto annexed, is the original lease and agreement above referred to (for copy see Abstract, pp. 50–'4); the other paper shown me is the original compromise of the suit between Mills County and the B. & M. R. R. Co., and is attached by a copy to answer of C., B. & Q. R. R. Co. as Exhibit C (for copy see Abstract, pp. 21–'3;) after the execution of the lease of December 31st, 1872, the C., B. & Q. R. R. Co. took possession of the property, both lands, assets, and moneys of the land department, consisting of about 180,000 acres of land, $2,000,000 of bills receivable, and notes, and exactly $112,987.88 in money.

V. Deposition of J. M. WALKER (Transcript, p. 1044):

I am president of the C., B. & Q. R. R. Co.; was such president December 31st, 1872, and prior thereto, and had much to do with making the lease of that date with the B. & M. R. R. Co. I prepared it myself, and executed it on the part of company. I supposed at that time and believed that the lands in controversy constituted a part of the grant of May 15th, 1856, made to the State of Iowa, and by the State of Iowa to the B. &

M. R. R. Co., to aid in the construction of that road. I did not know that Mills County claimed them; no information was given the board of directors of any outstanding claim thereon by Mills County or by any other person; the corporation supposed and believed, so far as
233 I know, and so did I at the time of making such lease, that a complete and perfect title was being acquired to those lands.

Motion to suppress portions of deposition filed. No ruling by district court.

VI. Deposition of HENRY STRONG (Transcript, p. 1050):

I was counsel for def't in the former action in this court, wherein Mills County, Iowa, was pl'ff and the B. & M. R. R. Co. was def't. The litigation in that case involved a claim by Mills County of certain lands as swamp lands, and by the railroad company as lands granted by the United States to the State of Iowa, and by the State to said railroad company to aid in the construction of that road. The cause was tried in the district court of Mills County and decided in favor of Mills County; an appeal was taken to the supreme court of Iowa and judgment affirmed; an appeal was taken from that decision to the Supreme Court of the United States at Washington. It is my present recollection that both the Fremont and Mills County cases against the railroad company were pending on appeal in the Supreme Court at Washington at the time the Mills County case was compromised, on the 13th of July, 1868. After the agreement of compromise nothing was done except that the railroad company conveyed certain lands to the county, and the county conveyed certain other lands to the railroad campany. I did not receive or deliver these deeds, but understand that such conveyances were made; this left the $10,000 to be paid by the county to the company; no attention was thereafter given by counsel for def't to the case, as the matter was supposed to be compromised.

Cross-examination:

I cannot remember whethdr or not any briefs were filed for the railroad company in the Supreme Court of the United States in the Mills County case. I know that such were filed in the Fremont County case. The two cases involved substantially the same questions of law. My recollection is that at the time of filing the argument in the Supreme Court at Washington the Mills County suit had been compromised, although I am not certain as to dates, but I am certain that before the hearing at Wash-
234 ton the Mills County case had been settled and compromised; the same argument was made and the same briefs filed by counsel for def't in both cases, as I recollect.

(Motion to suppress portions of deposition. No ruling by district court.)

VII. Deposition of H. A. COPELAND (Transcript, p. 1067).

I reside in Dakotah Territory; the paper now handed me, which I mark Exhibit A, is a copy of a proposition of compromise of a lawsuit between Mills County and the B. & M. R. R. Co. For a copy of this exhibit see abstract, pp. 21–'3); I was clerk of the board of supervisors of Mills County, and as such filed, signed, and certified to papers officially.

including this proposition; after it was accepted, I was employed and acted for the railroad company in conjunction with Mr. Simons, of Red Oak, to make an abstract of th eswamp land record of Mills County, showing what action the county had taken as to each tract of swamp land; I think I made this abstract while I was clerk; I did it at the request of the railroad company; gave it to them and they paid me for the work; in January, 1869, my term as clerk expired, when I was employed by the railroad company, generally to look after the interests of the company, and especially their land affairs, and so continued until deeds were exchanged; D. N. Smith and myself acting for the company and H. C. Watkins and William Hale for the county; we went over the whole record to determine and pass upon such pre-emptions as were fraudulent and such as were valid; we arranged the lands in separate lists, and all the even numbered sections not sold by the county and all the odd numbered sections not sold by the county on which there were no valid pre-emptions, were conveyed by the county to the railroad company, and all the odd numbered sections which had been sold by the county were released to the county by the railroad company; the odd numbered pre-empted lands were to be conveyed by the railroad company to the pre-emptors on payment for same; this was regarded by both parties as a final adjustment of the whole matter; it was inaugurated by the county supervisors for the purpose of
235 settling a lawsuit quieting the title to citizens' farms, and securing the construction of a railroad through the county; many prominent citizens of the county had become quite impatient about their homes, the title to which was involved in this suit, and a heavy pressure was brought to bear on she board by parties, especially who lived on the bottom lands, demanding a settlement of the suit; and the committee which was sent to Burlington was instructed by the board of supervisors to settle the suit if possible; my means of knowledge is that I was engaged in the adjustment of this contract all the time in the interest of the railroad company.

No cross-examination by pl'ff.

(Motion to suppress portions of deposition. No ruling by district court.)

VIII. Deposition of D. N. SMITH (Transcript, p. 1090).

In 1868 I was authorized by C. E. Perkins, of the B. & M. R. R. Co., to assist in adjusting a suit between Mills County and the railroad company; I conveyed written notice to the county that the company had accepted the proposition, and secured the written acknowledgment of the officers of Mills County that they had been served with notice of such acceptance; Exhibit A to my deposition is a copy of the paper upon which I obtained such acknowledgment from the officers of Mills County.

(For copy of exhibit see abstract, pp. 21 and 23.)

Q. 4 (Transcript, p. 1092). You may now state fully and in detail each and every step you took, as the authorized agent of said railroad company, concerning the settlement and adjustment of said contract between the company and the county.

(To which question, and the answer thereto, pl'ff, on the trial, objected in writing as incompetent and immaterial. No ruling by the district court.)

A. I employed Copeland, of Glenwood, and Simons, of Red Oak, to act with Hale and Watkins, a committee of Mills County, in examining swamp land records and plats for the purpose of ascertaining what lands Mills County had sold to bona fide settlers, what pre-emptions were valid and what fr'udulent, what lands the company were entitled to on the terms of the
236 contract submitted above. Hale and Watkins submitted to me a proposition with a list of 2,040 acres of swamp lands, asking that the railroad company agree that Mills County had sold and should reserve the same under the contract given above; finding some errors in this list, I did not agree to their request; as land agent of the company I gave the county a bond to deed to the county 560 acres of swamp land (designated by numbers) under this contract. Exhibit B, hereto annexed, is a copy of an obligation as land agent given by me to Mills County; on the 14th of March, 1870, I sent by mail to H. A. Copeland four deeds which the railroad company had executed under said contract; a true copy of my notes made the day that said deeds were sent is attached hereto as Exhibit C; I now hold two copies of my reports to George A. Harris, land commissioner of the B. & M. R. R., true copies of which I now hand to the notary to be attached to my deposition, marked Exhibits D and E.

Q. 5. Besides ascertaining who were bona fide purchasers and pre-emptors from the county, what was done by the joint committee?

(To which question, and the answer thereto, the pl'ff on the trial, objected in writing as incompetent and irrelevant. No ruling by the district court.)

A. The joint committee made up what we called "agreed lists" of lands—that is, complete lists of such lands as the county should deed to the railroad company, and such as the railroad company should deed to the county, and such as either party should deed to pre-emptors or bona fide purchasers; this joint committee also agreed upon and drew up the forms of deeds which should be used in conveying lands under the contract.

Q. 6. State whether or not the board of supervisors executed deeds to the company, or whether or not the company executed deeds to the county and individual claimants.

(To which question, and the answers thereto pl'ff on the trial, objected in writing as incompetent and irrelevant. No ruling by district court.)

A. The board did execute deeds to the company, and the company
237 did execute deeds to the county and to individual claimants in precise accordance with the results reached in the "agreed lists" by the joint committee.

Q. 7. You may now state how and in what manner the parties to the contract of compromise treated the same so far as you know.

(To which question, and the answer thereto, the pl'ff on the trial, objected in writing as incompetent and irrelevant. No ruling by the district court.)

A. So far as I know the parties to the contract of compromise treated the same in perfect good faith, and were well satisfied with the results reached and the agreements executed by the joint committee.

(No cross-examination by pl'ff.)

NOTE.—Before the trial commenced the pl'ff filed written objections to interrogatories 4, 5, 6, and 7 in chief, propounded to said witness D. N.

Smith, and to the answer thereto, and to the several exhibits referred to in said answer, including Exhibits B, C, D, and E, next following this note, upon the ground of incompetency and irrelevancy.

(There was no ruling by the district court on said objections, and no waives thereof by the pl'ff.)

EXHIBIT B.

Know all men by these presents that for and in consideration that the county of Mills, Iowa, have and do on this 4th day of January, 1870, in furtherance of the settlement of the swamp land suit between the county of Mills and B. & M. R. R. Co., conveyed by deed all the right of the said county of Mills in and to the following described real estate, situate in the said county of Mills, to wit:

Here follows the description of 1,760 acres of land, after which is written as follows:

The said B. & M. R. R. Co. does hereby agree with and assure the said county of Mills that the said company will at all times and under all circumstances save the said county harmless on account of any bargains or pretended bargains to sell any or all of the lands above described made heretofore by the said county or any of her officers, and also against any claim or right whatsoever that may hereafter be set up to any of the aforesaid lands by any person whomsoever, founded upon any contract or agreement or pretended contract or agreement made with the said
238 county of Mills or any of the officers of said county; and the said railroad company do further agree that the said railroad company will carry out in good faith on their part any lawful agreement heretofore made by the said county, or lawfully made by her officers for the sale of any of the aforesaid lands.

NOTE.—No signature to exhibit.

EXHIBIT C.

March 1st, 1870, mailed to H. A. Copeland, Glenwood, Iowa, the following-described deeds from the B. & M. R. R. Co. to be delivered as per agreement with Hale and Watkins:

To H. E. Veits, E. $\frac{1}{2}$ of SW. $\frac{1}{4}$ sec. 29, 71, 43, $100 due.
To H. W. Summers, E. $\frac{1}{2}$ of NW. $\frac{1}{4}$ sec. 33, 71, 41, $100 due.
To H. C. Watkins, E. $\frac{1}{2}$ of SW. $\frac{1}{4}$ sec. 1, 73, 42, $100 paid.
To D. C. Briggs, NE. $\frac{1}{4}$ of NW. $\frac{1}{4}$ sec. 31, 73, 42, $50 paid.
Charged Copeland to collect.

EXHIBIT D.

BURLINGTON, IOWA, *Oct. 5th*, 1870.

GEORGE S. HARRIS, *Land Commissioner of B. & M. R. R.*:

DEAR SIR: Enclosed please find one deed from B. & M. R. Co. to Mills County for some 1,920 acres of swamp land, and also one deed to Josiah Wearin for some 280 acres of swamp land. Mills County, by her board of supervisors, has executed a deed to the B. & M. R. R. Co., for 3,480 acres, which deed is now on deposit to be delivered to us whenever the enclosed deed are properly executed and returned to them.

So far as I am able to find anything of record this passing of deeds closes up our complicated swamp land contract with Mills County, including all pre-emptions, taking the county record as our guide. We have included in their deed for 3,480 acres of land, all that the railroad company are entitled to under their contract with the county. By referring to my letter accompanying deeds, last January, you will notice that to fully secure the interest of the railroad company some lands were deeded to the railroad company which the company agreed to deed back to citizens of the county; this was done to get the title out of the county, save litigation, and allow us to make the best possible arrangement with citizens.

The 280 acres to Josiah Wearin was included in our agreement to deed.

Yours, respectfully,

D. N. SMITH.

239 EXHIBIT E.

BURLINGTON, IOWA, *Dec. 16th*, 1870.

GEORGE S. HARRIS, Esq., *Land Commissioner B. & M. R. R.:*

DEAR SIR: At the request of your Mr. Mason, I herewith hand over a book containing a certified copy of the contract between Mills County and the B. & M. R. R. Co., also, the written statements taken on cases of pre-emption on swamp lands in Mills County. You will see by referring to the contract that the county offered as lands not sold about 9,080 acres, 4,660 acres pre-empted, one-half of which was supposed fraudulent, 2,330 acres; total amount as near as they could estimate it, 11,410 acres. County has deeded to railroad company, October, 1869, 11,645½ acres.

Respectfully submitted,

D. N. SMITH.

IX. Deposition of DAVID RORER (Transcript, p. 1097).

My name is David Rorer; I have attained long since my majority, and am a resident of Burlington, Iowa; I was one of the counsel for railroad company in a case instituted in the district court of Mills County, Iowa, wherein Mills County was pl'ff and the B. & M. R. R. Co. was def't; the records, I suppose, will show what the case was about; I know it was concerning land.

Q. State whether or not said cause was appealed from the inferior to the higher courts, and if appealed more than once, state the court to which it was last appealed?

A. It last went to the Supreme Court of the United States, but whether by appeal or writ of error I do not remember certainly.

Q. State whether or not the said suit was compromised between the parties thereto, and if so, state in what court the same was pending at the date of said compromise?

A. In answer to so much of the question as refers to a supposed compromise, I never had any personal knowledge of the making thereof; I have an indistinct recollection of hearing it said that some arrangement or partial compromise was made, but I know nothing personally of the making thereof, and was not present and had no hand in making it; in answer to the rest of the question, I will say that not knowing the date of the

240 supposed compromise, I cannot state where the case was at that date; I suppose by referring to the date of the compromise (if there was a written one), and to the records of the suit in the different courts it could be ascertained where the suit was at that date.

Q. 5. State what was done by the counsel for def't in said cause in respect to any further attention to the same after the said compromise was effected.

A. Not knowing when the supposed compromise was effected (if there was one), what its date was, I am unable to say what was done after that date. But whatever was done in court, if anything, after that date, I suppose will there appear, and whether done after or before, will appear by reference to the date of compromise, if there is one in writing.

Q. 6. State whether or not anything was done in said cause by the def't or its counsel after said compromise was agreed to, and, if you say anything was done, state what it was.

A. Don't know the date of the compromise (if there was one).

No cross-examination by pl'ff.

In answer to cross-interrogatories filed by the clerk, witness said:

1st. I am a stockholder in one or both of said railroads.

2d. All my statement to the foregoing answers which refer to my residence, and to my name, and to my being of counsel in said cause, and to the suits being about land, and to my hearing somethi'g about a compromise, and about the suit going to the Supreme Court of the United State', when I was myself attending to it at one time, and as to my being a stockholder in at least one of said roads, are of my personal knowledge. The residue of my answers I think sufficiently show the character in which it is made.

3d. I don't recollect anything more except how the cause was decided at Washington, and that I learned from the printed report thereof, and from common repute, and if otherwise, don't recollect.

241 X. Deposition of J. M. FORBES (Transcript p. 1124).

I was elected director of B. & M. R. R. Co. in March, 1857, and have so continued ever since. I don't recollect with certainty whether the board of directors ordered a survey through or near Mills County, but have no doubt they did so order, and for the purpose of getting the best line. I have no knowledge or belief that any of the lines were run as scare lines, or for the purpose of creating a fear in the minds of the people of Mills County as to where the lines would run; the one from Red Oak towards Council Bluffs was run for the purpose of finding the most feasable route.

Cross-examination:

Teilson was chief engineer of the railroad company, and surveyed the lines through or near Mills County in 1868. It is impossible for me to state what lines were run in 1868; I was not personally present. I understand a scare line to be run for the purpose of misleading some person or persons, and not for bone fide purposes of railroad building. I can't state anything as to the apprehension of the people out there occasioned by the running of these lines. I can't state from my own knowledge that the

running of the line from Red Oak to Council Bluffs in 1868 did not lead the people of Mills County to fear that the road would be constructed on that line. I don't know what was said to the people of Mills County as to the purpose for which said line was run. I am interested in the result of this suit as a stockholder. I cannot state what influence the proposition for a contract, dated July 13th, 1868, had in causing the road to be built through Mills County, via Glenwood, but with the strong influence that existed in the board in favor of the Council Bluffs route, I have no doubt but it had great influence; I do not now swear that, but for this proposition, the road would have been built to Council Bluffs. I was one the trustees of the mortgage given by the B. & M. Co. to secure certain bonded indebtedness, but resigned in 1872.

XI. Deposition of W. H. TAFT (Transcript, p. 1145).

I am auditor of Mills County.

Q. Have you in your possession any deeds made by railroad
242 company to Mills County, in pursuance of the settlement and adjustment of the settlement made between Mills County and the B. & M. R. R. Co. in 1868; if yea, state how many, and will you produce them and attach copies?

(Question objected to on the taking, and at the trial, as incompetent and immaterial. No ruling by district court, and no waiver by pl'ff.)

A. I here produce two deeds, and mark them A and B.

Exhibit A to W. H. Taft's deposition (*Transcript, p.* 1160.)

For the consideration of one dollar, and for the purpose of carrying out the terms and stipulations of a contract made with Mills County, in the State of Iowa, the B. & M. R. R. Co. does remise, release, and forever quitclaim to said Mills County, in the State of Iowa, the following described lands, situated in the county of Mills and State of Iowa, to wit:

Description.	S.	T.	R.	Description.	S.	T.	R.
NW. NW	5	72	40	W. h. E. h	33	71	41
W. h. NW	17	"	"	N. h. NW	"	"	"
S. h. NE	19	"	"	SE. SE	1	72	"
E. h. NW	1	73	"	SE. NW	19	"	"
W. h. of W. h	3	"	"	SW. SE	"	"	"
NE. SE	11	"	"	E. h. NW	23	"	"
S. h. SE	"	"	"	SW. q	"	"	"
SE. NE	15	"	"	W. h. SE	"	"	"
NW. q	"	"	"	N. h	25	"	"
SE. q	"	"	"	E. h. SW	"	"	"
S. h. SE	17	"	"	NE. q	27	"	"
N. h. SW	21	"	"	E. h. SE	"	"	"
NW. NW	29	"	"	SW. q	29	"	"
SE. q	31	"	"	NW. NW	35	"	"
SE. SW	"	"	"	W. h. NW. SW	"	"	"
S. h. NE	9	71	41	S. h. SW	"	"	"
N. h. SE	"	"	"	SE. q	"	"	"
SW. NW	11	"	"	SW. SW	19	73	"
W. h. SW	"	"	"	S. h. NE	1	"	42
NE. q	15	"	"	W. h. SW	"	"	"
E. h. SE	"	"	"	N. h. SE	"	"	"
NE. NE	17	"	"	NE. q	5	"	"
SW. q	21	"	"	E. h. SW	5	"	"
E. h	"	"	"	E. h. E. h	11	"	"
NW. q	27	"	"	E. h. NW	19	"	"
W. h. SW	"	"	"	SW. NE	31	"	"
SE. SW	"	"	"	SW. q	3	71	43
E. h. NW	29	"	"	NE. NE	9	"	"
E. h. E. h	"	"	"	SW. NW	"	"	"
243 S. h. SE	9	71	43	SW. SW	27	72	43
NE. NW	11	"	"	NE. SE	"	"	"
NE. NE	19	"	"	E. h. W. h	29	"	"
NW. NE	21	"	"	W. h. SE	"	"	"
E. h. NW	"	"	"	SE. NE	33	"	"
SW. NW	27	"	"	SE. NW	"	"	"
SW. SW	"	"	"	NE. SE	"	"	"
E. h. NE	29	"	"	NE. NW	35		
W. h. SE	"	"	"	S. h. NW	"	72	43
N. h. NE	33			SE q	"	"	"
SE. NW	"			SE. NE	19	73	"
E. h. SW	"			W. h. E. h	31	"	"
NW. SE	"	71	43	E. h. NE	1	72	44
S. h. SE	"	"	"	W. h. NW	"	"	"
W. h. NE	5	72	"	SE. NW	"	"	"
NW	"	"	"	N. h. SW	"	"	"
W. h. SW	"	"	"	SW. SW	"	"	"
SE. SW	"	"	"	NE. SE	"	"	"
SW. NW	7	"	"	W. h. NE	25	"	"
NE. SE	17	"	"	E. h. NE	13	73	"
NE. NW	19	"	"	NE. SE	"	"	"
W. h. NW	"	"	"	E. h. NW	35	"	"
N. h	21	"	"	NW. NW	"	"	"
SW. q	"	"	"	NE. SW	"	"	"
SW. SW	23	"	"	W. h. SE	"	"	"
E. h. NE	27	"	"				

Containing in all 9,340 acres, be the same more or less; in witness of which the said grantor hath hereto set its seal, and caused these presents to be signed by its treasurer, and countersigned by its land agent, this 13th day of October, 1869.

J. N. DENNISON, *Treasurer.*
J. W. AMES, *Land Agent.*

[SEAL.]

Duly acknowledged.

To which deed is attached the release of John N. A. Griswold and H. P. Kidder, trustees, of same date with deed, and substantially in same form as found on p. 70 of abstract.

244 *Exhibit B to W. H. Taft's deposition, being a quitclaim deed dated January 30th, 1871, executed by the same grantors to the same grantee, duly acknowledged and having substantially the same release of the trustees thereto, and describing the following lands:*

Description.	S.	T.	R.	Description.	S.	T.	R.
NW. NE	29	73	40	W. h. NW	17	71	43
SW. NW	"	"	"	W. h. NE	29	"	"
NE. NW	"	"	"	S. h. NE	33	"	"
NW. SW	"	"	"	NE. SE	"	"	"
N. h. NW	31	"	"	SE. q	21	72	"
N. h. NE	9			SW. NE	27	"	"
W. h	"	71	41	NW. q	"	"	"
W. h. NE	27	"	"	E. h. SW	"	"	"
NW. SE	"	"	"	NW. SE	"	"	"
NE. SW	"	"	"	S. h. SE	"	"	"
NW. SW	29	"	"	SW. SE	1	"	44
SE. NW	33	"	"	SE. SW	"	"	"
NE. SW	35	72	"	NE. SW	13	"	"
E. h. NW. SW	"	"	"	NE. SW	25	"	"
NE. q	"	"	"	NW. SE	"	"	"
N. h. NE	"	73	42	Lot 1	27	73	"
NW. SE	31	"	"	SW. NW	35	"	"
N. h. S. W	9	71	43	SW. q	15	"	40
SE. NW	"	"	"	NW. q	21	"	"
NW. NW	11	"	"				

XII. Deposition of H. C. WATKINS (Transcript, p. 1146).

My occupation is that of a lawyer; I think I was appointed in connection with Wm. Hale; at all events I so acted in adjusting the contract between Mills County and the railroad company, and prepared lists of swamp lands for the purposes of transfer as between the railroad and the county; we acted for the county and D. N. Smith and H. A. Copeland for the railroad company. Exhibit C to the answer of the C., B. & Q. (for copy of which see abstract, pp. 21–23) is the contract which we were appointed to adjust and carry out. I spent at least two months' time at it. The lists were reported to the board and deeds executed in accordance therewith. The contract, so far as known to me, was treated by the board simply as the instrument it purports to be. I should judge that prior to the making of the contract Mills County had sold or contracted to sell most of the lands in controversy, and many of the lands so
245 sold were actually occupied by settlers, and in proportion as the owners of the land in controversy had or had not confidence in the final result of the suit they manifested solicitude as to the result thereof.

Cross-examination:

I have practiced law in Glenwood since 1864. At the commencement of this suit Watkins & Williams, attorneys, of which I am a member, were of counsel for railroad company in a case against Jackson, which is still pending, the issue of which is substantially the same as in this case. Being retained in that case I would not feel at liberty to be of counsel for pl'ff in this case. I do not know that I was active at the election at which the proposition was submitted to the voters of Mills County. I was in favor of the proposition, but was not employed or paid by any one. I think I signed and got others to sign a circular addressed to the people of Mills County, urging them to vote in favor or ratifying the proposition referred to above. I think the securing of a railroad through Mills County, via Glenwood, was in our minds, as citizens, and also expressed in the proposition itself, and that there was solicitude that the road should

run through the county; and fears were entertained, whether general or not I will not say, that the road might not finally be built on that route. The reasons which operated to produce this fear in the minds of the people, as I recollect them, were, the road was not here; it was not here and running; surveying parties, which I understood were in the employ of the company, were looking up different routes across the county for the purpose of ascertaining where the road would be built. I cannot safely say further what aroused people's fears, because I don't know.

Redirect examination:

My recollection is that not long before the proposition was submitted and agreed to there were surveying parties sent out by the railroad company, and different routes were run. One route I remember was down Burger Hollow and another up Mud Creek.

246 XIII. Deposition of B. F. BUFFINGTON (Trans., 1183).

I live in Glenwood, and for six or seven years have been engaged in merchandizing and grain dealing; have lived in the county twenty years; was a member of the board of supervisors from 1869 to 1872; the contract of which Exhibit C to the answer of the C., B. & Q. is a copy, as I understood it, was regarded as a compromise and final settlement of the matter; the deeds that the county made were executed to the railroad company; I can't say whether all the deeds made by the company were to the county or some to individuals.

Cross-examination:

While I was a member of the board the B. & M. R. R. Co. demanded of the board of supervisors the money ($10,000) which they claimed under the instrument referred to as Exhibit C above; I don't know the date; I think it was before the vote was taken; I cannot tell how the demand was made; the board ordered the submission of the matter to the people at an election; I understood that one of the purposes in the instrument, Exhibit C, was to secure the building of a railroad through Mills County via Glenwood; I was not a member of the board at the time the contract was made; when it was submitted to the people for their vote at an election it was rejected.

Redirect examination:

My recollection is that when the vote was taken the railroad company had deeded most if not all the lands it had agreed to under the contract, and I understood that the railroad company had fulfilled the conditions of the contract on their part, and so far as I know this was the understanding of the board; the order by the board of supervisors submitting the contract to a vote of the people was made, I think, at the June session, 1871.

Recross-examination:

The board of supervisors had no authority for making the deeds for the swamp lands in controversy other than the pretended contract, that I know of; as a member of the board I should not have consented to deed any of the lands to the railroad company without a full compliance on the
247 part of the railroad company with the condition mentioned in the contract, to wit, building the road through Mills County and a depot at Glenwood; at the time of deeding the lands to the railroad company the contract had not been submitted to a vote of the people, nor au-

thorized by a vote of the people; I was a member of the board at the time the contract was submitted to a vote and rejected in the fall of 1871; the record here shown me is the record of the canvass of the vote of 1871; I find a line written across this page and book which reads, "for ratifying the contract with the B. & M. R. R. Co., 1,031 votes case; against ratifying, 357," which is incorrect, because the majority was largely against ratifying the contract; I think, if I state anything, that the figures named are simply transposed; the vote was largely against ratifying the contract.

(Here the witness attached a copy of the record of said election as Exhibit D. For copy of so much of same as relates to the vote on the contract see abstract, p. 78.)

At the time of executing the deeds by the county to the railroad company I was shipping grain principally to Chicago over the B. & M. and C., B. & Q. Railroads; I made some shipments to Kansas City and points in Nebraska.

Re-examination:

The fact of my being a shipper over the def't's roads had nothing whatever to do with my statements in this disposition or with my action in adjusting the contract.

XIV. Deposition of BENNETT CREECH (Transcript, p. 1201).

I was a member of the board of supervisors of Mills County from January, 1869, to fall of 1872, and during the adjustment of the contract between Mills County and the railroad company. (For copy of contract referred to see abstract, pp. 21–'3.) As I understood it, this contract was treated by the board as a settlement and adjustment of the swamp land question between Mills County and the railroad company; deeds of swamp lands were made by Mills County to the railroad company, and by the railroad company to Mills County in pursuance of this contract.

248 Cross-examination:

I was not a member in 1868, at the time the contract was made and agreed to. This contract also provided for the railroad through Mills County via Glenwood, and the building and maintaining of a depot at Glenwood. It further provided that if the railroad company should fail in these particulars, then that the contract should be as though never made. In the fall of 1871 this proposition or contract was submitted to a vote of the people. All the deeds above referred to had been executed prior to the time the proposition was ordered submitted to a vote of the people. The question was never submitted to a vote but once, and that was in the fall of 1871. I was a member of the board at the time such vote was taken, and took part in the canvass of the vote; the majority of the votes cast was opposed to the contract or compromise. The book here shown me is the official record of the canvass of that election; that part of the entry reading "For ratifying the contract with the B. & M. R. R. Co., ten hundred and thirty-one (1,031) votes cast; against ratifying, three hundred and fifty-seven (357)," is incorrect. The subsequent entry on the same page, "Against ratifying the contract with The Burlington and Missouri River Railroad Company," is correct. I can't give the exact number of votes cast for and against; my recollection is that there was a majority of more than 600 votes against the ratification. It is my

opinion that the error in the record consists in a mere transposing of the numbers. Exhibit C to my deposition is a copy of the record of said election. For so much thereof as relates to the vote on the proposition see abstract, p. 78. The compromise I have spoken of consists of Exhibit C to answer of C., B. & Q. R. R. Co. (Abstract, pp. 21–23), and the adjustment I have spoken of consists of the carrying out of this contract.

Redirect examination:

At the time of submitting the proposition to a vote of the people, the railroad company had complied with the contract on its part.

249 Recross-examination:

In addition to the exchange of deeds, as already referred to, the railroad company agreed to build its road through Mills County, and to build a depot at Glenwood, and agreed to deed certain lands to individuals on payment of $1.25 per acre. I recollect A. R. Wright, Geo. Pack, and H. Wearin as among the number. There was no authority for making the deeds to the railroad company other than the contract referred to. This contract had not at the time of making these deeds been submitted to a vote or in any way sanctioned by the people. I know that the contract provided that the suit pending should stand until the conditions of the contract were complied with. At the time the deeds were made to the railroad company I think the road was built through the county and a depot built at Glenwood. As a member of the board, I would not have consented to make the deeds if the road had been built through the county and a depot at Glenwood. The building of the road and depot was one of the considerations for which we gave the lands and agreed to give the money.

Redirect examination:

If the railroad company had refused to comply with any condition and obligation under the contract on its part, I would not have consented to a conveyance of any of the lands in controversy to the railroad company.

And def't, further to sustain the issues on their part, and subject to the objection made on the trial and entered of record, introduced the following witness and offered the following written evidence; it being expressly agreed in open court between the parties that in cases where no ruling should be made on said objections at the time the same were made, then that the court was to consider and rule on the same on final hearing, and to indicate such ruling in announcing the judgment and decree.

XV. W. W. PEET, on the part of def't, being sworn, said (Transcript 1227):

I reside in Burlington; am an employee of the C., B. & Q. R. R.
250 Co.; I have charge of the payment of taxes and all matters relating to taxes on railroad lands; have paid taxes this day upon some of these lands for the year 1875 amounting to $202.84. Exhibit A, hereto annexed, is a list of the lands so paid on.

Cross-examination:

I paid these taxes to-day, February 11, 1876; a little after the 1st of January, 1876, I made a list of lands in all the counties I had to pay throughout the State, including this list; I am the same W. W. Peet, whose deposition has already been taken and read in this case, and am the same person who made efforts to pay taxes on these lands for the year 1874; I have had conversation with my superiors in regard to coming here and offering to pay these taxes at this time; Mr. Touzalin instructed me to do so; I arrived here on the express at 9 o'clock a. m. to-day; the former treasurer of the county refused to receive taxes on every one of the tracts described in the list marked Exhibit A; I think I have stated in my former deposition how I made the tender to the former treasurer, and how he refused, and the list upon which I made a tender included all the lands in the list paid to-day; when I made the tender to the former treasurer I did not expect the money to be received; I decline now to answer whether or not the treasurer at the time of such tender offered to give me a receipt with a condition in it; I refer to my former deposition on that point; at the time of making such tender I knew that there was a law-suit pending in regard to the land, and when I paid the taxes to-day, I knew that this suit was pending, and involved the lands on which I paid, and knew that the former treasurer had refused to take the taxes on these lands, and gave the ordinary receipt; I knew that the former treasurer had given his reasons for his action in refusing to take the taxes, and gave the ordinary receipt, and these reasons were present in my mind when I paid the taxes to-day; the former treasurer told me at the time of the tender that the board had ordered him not to collect the taxes on these lands, and I did not enquire before paying to-day, whether or not this order had been rescinded; the present treasurer said nothing to me about the order; I asked him no questions.

251 Redirect examination:

My business here to-day was to pay taxes on other lands, as well as those in controversy; I didn't know that this suit was on trial at this time till I came here to-day; the treasurer took the money and gave me the ordinary receipt, and made *on* objection.

EXHIBIT A.

Being a list of lands paid on May 11, 1876, *in name of C., B. & Q. R. R. Co., amounting to* $202.86.

Description.	S.	T.	R.	Description.	S.	T.	R.
SE. SW	5	72	40	NW. SW	28	71	43
SW. q	6	"	"	Pt. NE. NE. ¼ NE. q	31	"	"
E. h. NW	7	"	"	E. h. SE	32	"	"
S. h. SE	9	71	41	NW. SW	27	72	"
SE. NE.	23	72	"	SW. q	17	"	"
NE. SE.	23	"	"	W. h. NW	20	"	"
NW. NE.	24	"	"	W. h. SW.	20	"	"
W. h. NW	24	"	"	W. h. of W. h	33	"	"
SE. NW	24	"	"	N. h. NE	33	"	"
Pt. N. h	24	"	"	NE. NW	33	"	"
W. h. NE	10	71	43	W. h SW	33	"	"
E. h. NE	20	"	"	SE. SW	33	"	"
E. h. SE	20	"	"				
W. h. NW	28	"	"				

XVI. M. M. ANGELL, on the part of def'ts (Transcript, p. 1245), being sworn, said:

I live in Glenwood. Here witness was shown a list, and the following question was asked:

Q. Did you make that list?

(To which question pl'ff at the time objected, on the grounds following:

"1. The lands described in the list are of the class of lands known as swamp lands, and not taxable until after a valid sale thereof by the county, and said lands being still owned by the county, the list offered is in contravention of law, and works no estoppel.

"2. That upon the issues made, this paper, and any statement of the witness in reference to the same, are incompetent."

Which objections were at the time overruled, and to which ruling the pl'ff at the time objected.)

252 A. I did make the list from the tax list in the office for the years 1871 to 1874, inclusive; it is correct.

Cross-examination:

I only know it is what the books indicate; I have no personal knowledge of anything stated in the list.

Redirect examination:

The books show the names of the party paying taxes according to the list.

253 *List referred to by witness Angell.*

Names.	Descripti'n.	S.	T.	R.	1874.	1873.	1872.	1871.
S. Masters	N. h. NE	5	72	40	$10 75	$7 41	$6 06	*$6 76
A. Wearin	SW. NE	"	"	"	3 60	.....	.....	*5 10
S. Masters	SW. NE	"	"	"	.....	2 48	4 60	.....
D. Henderson	E. h. SW	"	"	"	7 37	5 07	*7 69	8 14
Samuel Purcell	NE. NE	7	"	"	12 60	8 68	7 36	8 16
F. M. Thomas	SW. q	8	"	"	17 60	*11 84	*18 40	20 40
Henry Fisher	E. h. NE	17	"	"	9 00	6 60	9 20	10 20
Town of Hastings	NW. q	19	...	...	.....	.....	.....	*40 80
W. A. Eckley	E. h. NE	4	73	40	8 93	6 46	....	*10 45
Peter Eckley	E. h. NE	"	"	"	.....	.....	8 36	.....
" "	SE. q	"	"	"	.....	23 80	21 16	36 96
" "	W. h. NE	9	"	"	.....	5 44	*8 64	8 80
B. & M. R. R	SW. q	"	"	"	.....	17 60	21 12	35 10
J. A. Boswell	W. h. SW	14	"	"	18 72	11 52	.....	13 94
H. E. Perry	W. h. SW	"	"	"	.....	.....	14 00	.....
James Bone	NW. SE	17	"	"	3 52	2 56	2 80	*4 70
Strahn & Evans	SE. NE	20	"	"	.....	.....	2 80	3 50
Geo. Plumb	SE. NE	"	"	"	.....	2 56	....	.....
Strahn & Evans	NE. SE	"	"	"	.....	2 56	3 50	.....
Geo. Plumb	NE. SE	"	"	"	.....	.....	.....	3 79
S. Robbins and Strahn and Evans	NE. q	21	"	"	38 40	16 97	*14 00	32 34
Strahn & Evans	N h. SW	"	"	"	11 52	7 68	7 00	8 20
B. & M. R. R	S. h. SW	"	"	"	.....	6 72	5 60	8 16
Strahn & Evans	N. h. SE	"	"	"	7 68	6 72	*7 20	16 32
" "	N. h.	28	"	"	43 92	31 24	*22 40	32 64
" "	N. h. SW	"	"	"	9 76	6 72	*5 60	8 16
B. & M. R. R	NE. NE	29	"	"	.....	3 36	2 80	3 78
" "	S. h. NE	"	"	"	.....	6 72	5 60	7 56
" "	E. h. SW	"	"	"	.....	6 72	6 50	9 40
J. Wearin	NW. SW	"	"	"	2 72	3 36	3 60	3 83
L. Robbins	SW. SW	"	"	"	4 80	3 84	2 80	2 96
B. & M. R. R	SE. NW	"	"	"	.....	3 36	.....	4 70
Geo. Plumb	SE. NW	"	"	"	.....	.....	2 80	.....
B. & M. R. R	SE. q	"	"	"	.....	13 44	11 20	15 04
Strahn & Evans	SE. q	7	72	"	17 60	*11 84	*18 40	20 40
" "	N. h. NE	19	"	"	6 50	*5 92	*9 20	10 20
B. & M. R. R	W. h. SE	28	73	"	.....	.....	5 60	8 16
B. Pickerel	W. h. SE	"	"	"	.....	*8 57	.....	.....
Geo. Plumb	SE. SE	20	"	"	3 06	2 56	3 50	3 70
B. & M. R. R	SW. SW	22	"	"	.....	4 20	3 50	8 16
" "	N. h. NE	31	"	"	.....	6 72	7 00	9 40

Names.	Descripti'n.	S.	T.	R.	1874.	1873.	1872.	1871.
" "	S. h. NW	"	"	"	.....	6 30	6 57	9 40
" "	SW. SW	10	71	41	.....	4 76	6 60	5 33
E. T. Musselman	SE. NW	11	"	"	1 62	6 35	*8 80	7 68
Murphey	E h. SW	15	"	"	9 29	7 52	*11 76	9 36
"	W. h. SE	"	"	"	9 72	7 12	*17 28	9 36
Geo. Wilson	SE. SE	31	"	"	.....	9 07	5 04	6 84
F. Hobbs	S. h	32	"	"	.....	*77 09	*50 99	55 81
B. & M. R. R	E. h. SW	33	"	"	.....	16 00	*8 40	11 40
J. Antrim	SW. SW	"	"	"	5 20	6 80	*4 20	5 70
H. W. Summers	E.h.E.h.NW. SW.	"	"	"	29 50	25 80	19 32	20 22
J. Wearin	E. h. SW	1	72	"	8 80	.....	.....	10 20
W. Kempton	E. h. SW	"	"	"	.....	8 80	.....	.....
254 Chas. Ross	E. h. SW	1	72	41	.....	.....	9 20	.....
B. & M. R. R	W. h. SE	13	"	"	.....	4 00	6 00	9 00
S. G. Sidner	NW. NE	1	73	42	.....	4 82	4 90	5 20
H. Van Kirk	NE. NW	"	"	"	5 09	4 57	11 71	6 22
D. Cavanaugh	NW. NW	13	73	"	.....	7 15	6 55	6 91
Smith & Wyant	W. h. NE	19	"	41	16 66	.....	13 10	13 81
J. C. Herbert	SE. SW	"	"	"	9 42	7 22	8 16	8 67
W. L. Wyatt	W. h. SE	"	"	"	16 86	.....	13 10	13 82
A. H. Bergen	NW. q	1	71	43	18 86	20 48	16 17	16 64
W. E. Dean	W. h. NE	3	"	"	.....	11 91	15 68	16 04
" "	N. h. NE	11	"	"	.....	5 62	16 38	16 76
C. L. Epperson	SW. NE	5	"	"	6 76	4 16	6 55	6 70
B. S. Gunsollier	Pt. SE. NE	"	"	"	38	21	26	27
G. Morrow	N. h. SW. & NW. SE.	"	"	"	23 24	14 30	21 06	21 54
T. S. Crewdson	NE. SE	"	"	"	12 44	6 80	9 36	9 58
T. A. Wright	SW. SE	"	"	"	10 38	5 67	7 02	7 18
W. Jones	SE. SE	"	"	"	7 94	4 91	7 02	7 18
J. Haynie	SW. NW. & S. h SW.	9	"	"	31 54	20 60	31 52	33 52
A. R. Wright	Pt. SE. q	"	"	"	39 97	24 68	38 22	39 10
J. S. Wright	E. h. NW	10	"	43	14 40	14 08	*10 96	9 82
P. L. Delashment	NE. SW. & N. h. SE. & S. S. SE.	17	"	"	.....	13 00	29 59	30 17
P. L. Delashment	W. h. SW. & SE. SW. & SW. SE.	.....	.....	.....	.....	*8 01	*10 80	*10 73
W. W. Crewdson	NW. NW	21	"	"	6 48	5 81	7 03	7 72
Van Eaton & Crockett	SW. NW	"	"	"	6 82	4 16	4 24	6 18
"	NW. SW	"	71	"	5 28	3 21	7 24	6 18
Thomas Conner	SW. SW	"	"	"	4 01	2 48	4 19	4 12
Jas. Queen	SE. SE	29	"	"	2 31	3 86	*2 97	2 98
B. & M. R. R	SW. NE. & NW. NW. & W. h. SE.	34	"	"	.....	5 81	10 44	16 61
E. Haymaker	SW. SE	33	"	"	3 72	2 75	5 78	.....
S. Ives	SW. SE	"	"	"	.....	.....	.....	9 27
B. & M. R. R	SE. SW	26	72	"	.....	2 94	2 32	3 41
L. H. Gamon	NE. SW	29	"	"	6 30	.....	.....	.....
O. B. Gould	NE. SW	"	"	"	.....	4 90	7 92	8 51
Jas. Dews	NE. SW	"	"	"	.....	.....	.....	5 44
Giles Hinson	NW. SW	"	"	"	3 77	2 34	5 28	.....
H. B. Scott	NW. NW	35	"	"	54	*2 71	2 76	*5 70
J. Johnson	NE. SW	27	"	"	6 34	5 43	5 57	5 69
O. Allis	E. h. NW	17	73	"	12 00	10 20	*8 00	3 60
J. Hamilton	E. h. SW	"	"	"	5 60	*4 76	*8 00	7 20
B. & M. R. R	NW. NW	19	"	"	.....	1 12	4 00	1 92
J. Hamilton	NW. NW	20	"	"	2 80	*4 56	5 28	3 12
J. Graham	SW. SE	25	72	44	3 60	2 80	7 04	9 20
Hendrie	SE. SE	12	"	"	2 02	.....	.....	.....
J. Calaman	SE. NE	"	"	"	.....	1 56	6 60	6 80
B. & M. R. R	W. h. SW. NE	2	71	41	.....	2 38	2 64	2 30
H. B. Jones	SW. NE	9	"	"	5 84	4 76	5 04	5 04
J. H. Fisher	SE. NE	19	"	"	5 84	4 76	5 04	5 04
255 B. & M. R. R	E. h SW. & W. h. SE.	29	71	41	.....	30 80	20 16	24 20
Kilpatrick Bros	W. h. SE	28	"	"	16 17	11 47	14 40	14 40
B. & M. R. R	SE. NE	32	"	"	.....	8 00	5 04	6 84
Barnes	W. h. NE. & SE. NW.	28	"	"	16 46	17 52	15 12	16 92

[On the original table, and over the amounts marked with *, are written the letters "B. & M. R. R.," indicating that the amounts were paid by said B. & M. R. R. Co]

XVII. Defendant next offered in evidence (Transcript, 1251) the swamp land records of Mills County, so far as they show sales by the county of these lands in controversy to private citizens prior to the institution of the first suit by Mills County against the B. & M. R. R. Co., and also sales prior to the settlement of July, 1868; that is, so much of the same as show sales of land by Mills County that were in controversy in the other suit prior to the settlement.

Which offer pl'ff at the time admitted that the book offered is a part of the records of the auditor's office, but objected to the book as concluding the county in regard to the title she may have had in the lands; also because the book is not the best evidence as to contracts or as to title.

Pl'ff further objected to the book being received as evidence of the sale of any other lands than those indicated in the statement of counsel. Before passing upon the objection, def's introduced

XVIII. J. M. POWELL (Transcript, 1252) as a witness, who, being sworn, said: These are the books belonging to the auditor's office; they are a record of the pre-emptions and sales of swamp lands in this county; there are no other records that I know of.

Cross-examination:

There are other records in the recorder's office, records of deeds made, and there are other records in the auditor's office—plats, for instance, of swamp lands patented by the State to the county.

256 Re-examination:

These are the only record of sales and pre-emption of swamp land that I have any knowledge of. I am auditor of the county at this time; after the land is sold and paid for it is deeded to the individual, and that deed is placed on record in the recorder's office, and there is a book in the auditor's office that will 'how a part of the lands deeded; I have no name for the book; it is just a little bit of a memorandum book, and is very incomplete.

Counsel for def't stated that they offered the whole of the books so far as they related to the lists of lands conveyed to Mills County or to individuals, and thereupon the court overruled the objection of pl'ff; to which ruling pl'ff at the time excepted.

NOTE.—No further designation of the portions of books so offered were ever made to or considered by the district court.

XIX. D. C. BRIGGS, on the part of defendants (Transcript, 1259), being sworn, said:

I have lived in Mills County twenty-one years; was a member of the board of supervisors for the years 1868 and 1869; I think I was absent when the committee was appointed to submit a proposition to the railroad company in 1868, and I don't recollect if I was present at the meeting of the board in November, 1868, when the committee reported; the question of compromise was before the board, and they ratified it; in adjusting the contract the company quitclaimed a portion of the lands to the county, and the county quitclaimed another portion to the railroad company; the county was also to pay $10,000, I think; I was a member of the board at the time when some of these deeds were made.

XX. L. W. TUBBS (Transcript, 1261), on the part or pl'ff, being sworn, said:

I have lived in this county something over twenty years; was at one time county judge; lived here when the committee was appointed to confer with the railroad company; was one of that committee; I don't know that the railroad company did anything to induce the appointment of
257 that committee; so far as I understood it there was quite an uneasiness in this county at that time; the county had sold a large portion of land to individuals who were anxious to get their titles settled; at the time this committee was appointed the railroad company had surveyed no lines in, near, or through Mills County, except the original survey of 1856.

Cross-examination:

The committee was appointed in the month of June; except the original line, no lines had been run at that time; if my memory serves me right, the party running the line from Red Oak to Council Bluffs was not out at that time; I have no recollection of a party being out before we returned from Burlington; there was a party out that summer and fall—towards the fall of the year, I can't tell just when it was; in respect to alarm being felt in the minds of the people in regard to whether they would get the road centrally through the county or not, I will say that we were always uneasy about that, for we did not know where it would go, or anything about it; I didn't recollect anything more at that time than there had been for years previous; I refer to the 1st of June; I know there was an uneasiness that fall, quite an uneasiness in regard to the road; I have been some little interested as a citizen in the affairs of this company; I did sign a petition to the board to withdraw this suit; I presented the petition to the board and made a speech; said it was advisable to stop this suit for the best interests of the county; I urged its withdrawal as an individual; in respect to the question as to whether I was in conference with the railroad attorneys, I answer that I have often talked with the attorneys of the railroad company; at this time I only talked with the attorneys here; I did take quite an active part in trying to have this suit stopped; I advocated the petition for its withdrawal; the compromise between the railroad company and the county was the contract made by the committee; I refer to no other instrument.

XXI. D. C. BRIGGS (Transcript, 1257), on the part of def'ts, being sworn, said:

258 The object of the compromise was to settle the lawsuit, as I understood it, and thereby settling the titles of purchases from the county; as I understood it, there was doubt as to the result of the suit.

Cross-examination:

Many people felt an anxiety about the location of the road; I was present at the time the contract was ratified by the board of supervisors; I voted for it.

(Here the records of the vote referred to was shown witness showing that he did not vote for its ratification, and he then qualified his former statement as follows:)

It is possible that I was not present at the time the vote of ratification was taken, but I was present at the time the deed was signed; I was not

present at the meeting when the contract was ratified; I was absent in Michigan; there was existing in the minds of a great many of the people at this time considerable anxiety in reference to getting the railroad here; I did not consider the location of the road a question; I felt sure the railroad company would go where they pleased, regardless of what we did; I had heard of a line being run from Red Oak to Council Bluffs, but whether it was done before or after, I cannot remember.

Redirect examination:

I think the running of this line had no influence upon my mind or vote.

Recross-examination:

I had an interest in the swamp land matter; a pre-emption on a 160 which I did not get, a contract on a 40 which I did get from the county.

XXII. S. W. WILLIAMS (Transcript, p. 1282), who, being sworn, said:

I have lived in Mills County over ten years; was a member of the board of supervisors in 1868, at the time the committee was appointed to confer with the railroad company. The object of appointing this committee, as I recollect, was to settle the lawsuit and secure to actual settlers the swamp lands in the county; I was not cognizant of anything that the railroad company did to influence the action of the board at that time.

259 Cross-examination:

There was another object sought in making the proposition, that was to secure the railroad through Glenwood; that was one object in making the proposition; I knew nothing personally at that time of the running of the line from Red Oak to Council Bluffs, only by hearsay; I had heard of such a survey; there was at that time some considerable uneasiness felt here with a good many that the road would not be built through Glenwood and centrally through Mills County, and that was one the inducements in making the proposition. In my answers I have had reference to the feelings, views, and fears of the board as I understood them.

Redirect examination:

We wanted to make the best bargain we could; we were working for the county, and we wanted to make the best bargain we could for the county, and if we could get the railroad through the county, and get the titles to swamp land settlers in the county, we thought we were doing a pretty good day's work.

XXIII. WILLIAM HALE (Transcript, 1287), on the part of def't, being sworn, said:

I reside in Glenwood, and am a lawyer; have lived in Mills County seventeen years; was attorney for Mills County in the former suit between the county and the B. & M. R. R. Co., commenced in 1862 or 1863; the record to which I refer has already been introduced in evidence on this trial; that suit was begun in the district court of Mills County, and was carried to the supreme court of the State, and from there to the Supreme Court of the United States. In 1866 a proposition for a settlement of that suit was made; I was authorized to make it by a verbal order of the board; the proposition made was similar in terms to the one in contro-

versy, but it was not accepted by the railroad company; subsequently, in June, 1868, a committee was appointed by the board to submit another proposition, which was accepted; the latter proposition was submitted to the railroad company in July of that year; we gave the proposition to C.
260 E. Perkins, the general superintendent at that time; he said that he would submit it to the authorities, and if accepted would notify us of the fact. On the 31st of October, 1868, we received notice in writing of the acceptance of the proposition, and within a day or two afterwards we reported our action to the board in the matter, and the same was ratified by the board. I notified Mr. Ewing, my associate in the case, of the proposition and its acceptance, and soon after its ratification I told or wrote Mr. Harvey—I think I told him verbally—to inform Mr. Ewing of the fact that this proposition had been accepted; and I also think I wrote Mr. Ewing about that time, under date of April 12th, 1869; this letter was undoubtedly mailed and addressed to him at Washington, D. C. After the acceptance of the contract by the county Mr. Watkins and myself were appointed to aid the board in adjusting and carrying out the provisions of the contruct.

Cross-examination:

I have no distinct recollection of mailing the letter to Ewing; but have no doubt that I did. I am now attorney for the railroad company; my first case for the company was some time in 1872 or 1873; I did not appear personally in the old suit in the Supreme Court of the United States.

Redirect examination:

The basis upon which I base my testimony in regard to the sending of that letter to Mr. Ewing is that I received a reply to it from Mr. Ewing.

Recross-examination:

Q. Well, we want that reply.
A. Well, I think it is in the office; I know that I received it.

NOTE.—This letter was not produced.

XXIV. J. H. WING (Transcript, 1301), on the part of def'ts, being sworn, said:

I came to Mills County in the spring of 1859; was a member of the board in 1868, when committee was appointed to submit proposition to the railroad company; the lawsuit was about the title to the swamp lands in the county.
261 Q. State what the object of the board was in appointing that committee.

(Objected to by pl'ff as not the best evidence, the object being expressed in the resolution of appointment; which objection was overruled by the court, and to which ruling the pl'ff at the time excepted.)

A. To settle this suit. The suit was then pending, and there was a chance that the country might lose it. There was expense attending the suit, and indirectly the suit was harrassing to the settlers. These were some of the causes which led to the contract.

Cross-examination:

I have not seen the contract since that time; I can think of a great many things that were talked about at that time, but can think of nothing else that influenced myself as a member of the board in the appointment of the committee; I did not consider the getting of a railroad to Glenwood had anything to do with it; I will not swear the securing of a railroad was not talked about by the members of the board; I will only swear so far as I myself was concerned; I know that the securing of a railroad is in the contract, and would not swear that that was not one of the objects in making it; I would not swear that it was or was not, except so for as I myself was concerned; I think there was some alarm here felt in reference to where that road would go, and I think it was talked about when the committee was appointed, and I think the settling of that feeling of alarm on the part of the people had something to do with it; I remember a survey was made during that summer from Red Oak to Council Bluffs.

Redirect examination:

I do not recollect of the railroad doing anything prior to the appointment of the committee to confer with them that influenced my action or the action of the board in submitting that proposition.

Recross-examination:

I can't say that the survey of the Mud Creek route from Red Oak to Council Bluffs was not then in progress; it might have been and it might not.

262 I could not state whether I knew of this survey before the proposition was submitted in July following; if the party were in the neighborhood of my res'dence I knew it; I knew Haven; he was at my house frequently while working on this survey, but later than the time referred to, some time in August; I saw him until about the time he quit; I know that I met him; he was at my house several times; I fix it after the 3d day of August; I threshed on that day, and we had a flight of grasshoppers visit us at the same time, on the occasion of my making his acquaintance.

XXV. (Transcript, p. 1314.) Pl'ff next offered in evidence the act of Congress of June 2d, 1864.

XXVI. S. V. PROUDFIT (Transcript, p. 1315), on the part of def't, being sworn, said:

I have made diligent search in our office for the letters received and failed to find them. I have a distinct recollection of seeing the letters myself within the last eighteen months in our office; there was a small package; I do not know how many letters; I recollect that they were taken from the files for some purpose, but what for I cannot remember.

Cross-examination:

I have no distinct recollection of the contents of these letters further than the fact that they were letters from Thomas Ewing. I fail to find any letters from him. Mr. Hale, Mr. Stone, and myself have common custody of all business correspondence. I don't know whether or not these

letters are in the personal custody of Mr. Hale or Mr. Stone. I know that they are not in their proper place in the office, and have no knowledge of their whereabouts.

XXVII. WM. HALE (Transcript, p. 1318), recalled by def't, said:

I have no knowledge of these letters. I supposed that they were in the office until last night or this morning. I have not seen them since they were taken from the files for Mr. Williams, who was looking up a matter of fee in that case. In respect to receiving a reply to my letter bearing date April 12th, 1869, I will state that I had a correspondence with Mr. Ewing in regard to the case after the settlement, but whether I got
263 a distinct reply I cannot now swear. I think he knew of the settlement before April 12, 1869. I am confident he did afterwards. I don't know of any other particular fact, only I remember that fact distinctly.

Cross-examination:

I have not made personal search for the letters.

XXVIII. Press copy of letter (Transcript, 1320). Def'ts here offer press copy of the letter rom Wm. Hale to Thomas Ewing, dated April 12th, 1869, to which offer and letter the pl'ff at the time objected, as immaterial, irrelevant, and incompetent; which objection was overruled by the court, and to which ruling the pl'ff at the time excepted, and the copy was received, as follows:

GLENWOOD, IOWA, *April 12th*, 1869.

Hon. THOMAS EWING, *Washington, D. C.:*

MY DEAR SIR: I am in receipt of yours of 8th inst. I requested Hon. J. A. Harvey, now in Washington, and who is attorney for Frémont County vs. B. & M. R. R. Co., to inform you that the case of Mills County vs. B. & M. R. R. Co., to which you refer, was, in July last, settled by the county and railroad authorities. It was agreed that the case should be continued from term to term until it should be ascertained that the B. & M. R. R. Co. would comply with the conditions of settlement.

Respectfully,

WM. HALE.

XXVIII. D. M. WHITFIELD (Transcript, 1321), on the part of def'ts, being sworn, said:

I was a member of the board of supervisors in 1871, and while such member there was a claim on the part of the railroad company presented for the $10,000 provided for in the contract. It was presented by Mr. Watkins, the railroad attorney, with some deeds for the board to sign. I said I did not consider it a just claim, and that we could not pay the money, and I could not sign the deeds, and Mr. Creech and Mr. Buffington concluded they could sign the deeds presented by Mr. Watkins, but they did not see how they could pay the $10,000. The board was unanimous in refusing to pay the claim.

264 Cross-examination:

This was in 1871, and this was the cause of the submission of

the proposition to a vote of the people; it was thought by the board that the people should understand the acts of this committee or something to that effect, and Mr. Watkins was chosen to make a statement of this matter in full, and have it published, but before publication the board was to review it; that was Mr. Watkins' wish and the wish of members of the board; Mr. Watkins was chosen to get up this article to be published, leaving it to be voted on by the people; Mr. Watkins, their attorney, and Mr. Creech and Mr. Buffington thought it was the best they could do; this was at the time of the signing of the deed by Buffington and Creech in June, 1871.

For copy of this deed see Exhibit G, abstract, p. 20.

XXIX. Tax deeds (Transcript, 336 and 1225). Def'ts also offered in evidence the tax deeds attached to the amendment to the answer of the C., B. & Q. R. R. Co. (Transcript, 338), to which offer and deeds the pl'ff at the time made and filed written objections thereto, as follows:

1. Because the lands described in said deeds are of the class known as swamp lands, and being swamp lands are not subject to taxation until after a valid sale thereof by the county, and said deeds being upon lands still owned by the county they are in contravention of the statute and work no estoppel.

2. The treasurer is guided by the statute in the discharge of his duties. Under the statute there was no power to tax the lands; therefore his act being unauthorized is not the act of the county, and the county is not estopped from denying the validity of his acts in executing the deed.

3. Upon the issues made the deeds, and each of them, are incompetent, irrelevant, and immaterial.

For the deeds offered as aforesaid, see Transcript 348, and abstract, 63.

265 There is no ruling of record by the district court on the objection aforesaid, nor were such objections waved by pl'ff.

XXX. Def't further offered in evidence the lease from the B. & M. R. R. Co. to the C., B. & Q. R. R. Co. (for copy of which see abstract, p. 50–'4), to which offer and lease the pl'ff at the time made and filed written objections, as follows:

I. Because the lease only purports to be an agreement to convey to the consolidated company, and is not in itself a conveyance, and hence is incompetent to show title in said C., B. & Q. R. R. Co.

II. Because upon the issues made said instrument is incompetent, irrelevant, and immaterial.

No ruling by the district court and no waiver by the pl'ff.

XXXI. Def't further offered in evidence Exhibit E to the answer of the C., B. & Q. R. R. Co. (for copy of which see abstract, pp. 46–'9), to which offer and exhibits and deeds therein referred to pl'ff at the time made and filed written objections, as follows:

I. The lands described are of the class of lands known as swamp lands, and being such the same already belonged to the county, and the county took nothing by said deeds; the county owned the lands before and acquired no other or further title by the deeds, and hence the county is not estopped from showing that the deeds are void.

II. The deeds referred to are mere quitclaim deeds, and of themselves afford no evidence of either good faith or valuable consideration.

III. Upon the issues made the list and deeds are incompetent, irrelevant, and immaterial.

No ruling by the district court, and no waiver by pl'ff.

Def'ts rest in chief.

266 *Plaintiff's rebutting evidence.*

XXXII. D. M. MITCHELL, (Transcript, p. 1328), recalled by pl'ff, said:

I stated in my former testimony that I was once auditor of Mills County; my recollection as to how the lands in controversy in this suit came on the tax list is, that some time in the winter of 1871, in January or February, Mr. Atkins, then treasurer of Mills County, came to me and said that the railroad company, by their proper agent, had come in and offered to pay taxes, or wished to pay taxes on these lands, and that the lands were not on the books; this was the year in which the lands were not assessed; Atkins suggested as they were there ready to pay their money he thought the lands ought to be put on the books, so that we could receive the money and give them proper credits; I recollect of disputing with Atkins about our authority to put these lands on, but we finally concluded to do so, and went to work, and from the lists furnished by the railroad company, put the lands on the books as an ad'enda to the tax books; before this time I, as auditor, had passed the books over to the treasurer, and for the reasons aforesaid I placed the lands on the tax books as an ad'enda; this was in the beginning of 1871; in preparing books for the township assessors for the subsequent years we obtained descriptions and owners' names from the former tax books and transfer books; I don't know any particular reason for including these particular lands; all the lands in the county, I believe, are put on the assessor's books; and the ownres' names when known.

Cross-examination:

The plat of transfers was kept in my office; there was indicated thereon in pencil the names of the owners of lands; these names were put there in the transfer of deeds, and the plats purported to show the ownership of lands—the last transfer—the transfer of record in the recorder's office.

Redirect examination:

For the year 1871 we obtained the list of lands to be put on the assessor's books from the tax books of previous years and the transfer
267 books; we had both on our tables; my term of office expired with the year 1871, and Mr. Powell succeeded me as auditor.

Recross-examination:

I remember that in 1868 the board remitted the taxes on all railroad lands in the county for two years; I understood it was for the year 1868 and 1869; the list furnished by the railroad company in the forepart of 1871, already referred to, was put on the tax books for 1870; that would be the first year after the years for which taxes had been remitted; no real estate assessment was made in the year 1870; Mr. Atkins told me that the agent of the railroad company had applied to him to pay the taxes on

their lands; I don't know whether the fact of such application was known to the board of supervisors in the year 1871; I don't know whether the matter was brought up and explained to them or not; I could not say that the list contained all the lands in the county belonging to the railroad; the tax book upon which I placed these lands as an ad'enda is, I presume, in the treasurer's office; I don't remember whether the list was kept on file or returned to the railroad company.

NOTE.—At this point the record recites the following (Transcript, p. 1238): Counsel for defendant offer in evidence a list of the lands that were furnished by Mr. Atkins to Mr. Mitchell, showing the list of lands that he put on the tax books for the year 1870, but no such list was furnished, in fact, and none such is now found among the files of this case.

XXXIII. A. J. HIGHT (Transcript, 1339), being sworn on part of pl'ff, said:

In the year 1873, I think it was, I acted as clerk for the auditor of Mills County, and assisted the auditor in making out the assessor's books and in putting the list of lands thereon for that year; so far as known we wrote the owners' names in pencil opposite the descriptions, so that the assessors might erase and make corrections; we obtained descriptions and owners' names from the former tax books and the transfer books, and these were put on the assessor's books, in pencil, before they were sent out.

Cross-examination:

To the best my knowledge we put on the assessor's books
268 for that year every acre of land in Mills County, including, of course, the lands in controversy; the transfer books were kept in the auditor's office, and the law made it his business to enter transfers therein.

XXXIV. Act of general assembly (Transcript, 1344). Counsel for pl'ff in this connection offered in evidence chapter 61, of the acts of the general assembly of Iowa for 1866, being an act for the transfer of real estate, to regulate assessments thereof, and for the collection of revenue.

XXXV. LEWIS ROBBINS (Transcript, 1342), being sworn on part of pl'ff, said:

I was a member of the board of supervisors in 1873, and remained such for three years; on the first Monday in September, 1874, a question came before the board as to whether these lands in controversy were properly on the tax lists, and whether or not they should remain thereon; and the order of the board at that time was not to have them go on the tax books at all; that was the order of the board; at the October meeting following we discovered that the order had not been entered of record, when we repeated the order; the same order was continued in October which had been made in September; I did not know but that this order had been entered of record, until the January, 1875, meeting of the board; at that meeting the order was again repeated and entered of record; I think it was left off the record at both prior meetings by inadvertance.

Cross-examination:

The action in September was not a formal action of the board; there was

a talk and understanding between members of the board; it was an order the same as all other orders were made; there was an understanding that the lands should be stricken from the tax lists, and that they should not go on the tax lists for the year 1874; the tax books had not at that time been made out for the year 1874, and the order was that the taxes for 1874 should not be collected; when the order was put on the record at the January meeting, 1875, the lands had already been placed upon the
269 tax books, but the order in September previous was that they should not go on the tax books; Mr. Taft was then auditor; I think he was present when the order was made; he was busy at the desk writing for somebody; the second time, in October, his attention was called to it; I do not know why it did not go on record.

Order of board.

XXXVI. (Transcript, 1348.) Pl'ff next offered in evidence an entry in minute book B, of the auditor's office, p. 502, showing that the board made an order to remove the lands in controversy in this suit from the tax lists of 1874, which order is in the words and figures following:

Nunc pro tunc order of board of supervisors from minute book B, page 502. (See Transcript, p. 887.)

JANUARY 4TH, 1875.

We authorize the above minutes to be corrected so as to show that at the meeting of last date it was ordered that the taxes for the year 1874 on the swamp lands on which the title is in dispute between the county and the B. & M. R. R. Co., be not collected, and that the auditor be authorized to furnish a list of said lands to the treasurer, which list shall be his authority for not making such collections.

XXXVII. D. M. WHITEFIELD (Transcript, 1348), recalled by plaintiff, said:

At the September session of the board the matter of removing the lands in controversy from the tax books was talked over, and it was unanimously agreed not to receive taxes on these lands; the way the board had been doing business when we came to one opinion in regard to anything, it was taken as granted and placed on record; there was hardly ever a written motion; we expressed ourselves and let the auditor make up the record; I don't know that the auditor's attention was called to it at that time; we met again on the 30th of October; I requested Mr. Taft to write up the proceedings of every day so that I could sign it in the evening, which he did, except the proceedings of the last day of that session, when the proceedings were published; the order was still wanting at the Jan-
270 uary meeting, 1875, when the proceedings of the previous meeting were read over; the order was not mentioned in the proceedings, and at that meeting the order was formally drawn up and signed and placed on record; it should really have been in the proceedings of October previous; the auditor made no excuse why it was not on the record before; not a word said; just placed it there; passed it to the board and they signed it; that's all I know about it.

Cross-examination:

From hearsay I know that the county remitted taxes on the lands of the railroad company for the years 1868 and 1869; I was not a member of the board at that time.

XXXVIII. JOEL SOLOMON (Transcript, 1353), sworn, testified on part of pl'ff:

I am a land agent; buy and sell lands for others; as such agent for Orlando Meads I sold tax certificates of purchase held by Meads to J. N. Denison, on the 28th of October, 1867; the sale was completed on that day; the paper here shown me is a correct list of the lands so sold to Dennison.

Pl'ff here offered in evidence the list of lands referred to by the witness Solomon, which is in words and figures as follows:

Mead's list assigned to Dennison Oct. 28, 1867.

Description.	S.	T.	R.	Description.	S.	T.	R.
SE. NW	1	71	43	SE. SE	29	72	43
W. h. SE	"	"	"	W. h. NE	33	"	"
N. h. NW	19	72	"	SE. NE	29	"	"
SW. NE	15	73	40	N. h. NW	33	"	"
NE. SW	31	"	"	SW. NW	"	"	"
NE. NE	1	"	42	NW. SE	1	"	44
SE. SE	19	"	43	SE. SE	"	"	"
E. h. SW	7	72	40	NW. NE	27	"	43
E. h. NW	15	71	41	SW. NE	13	"	44
SW. q	"	"	"	SW. SW	5	"	40
SW. SE	27	"	"	NW. q	"	71	43
W. h. SE	15	"	"	NW. SW	17	"	"
NW. SW	33	"	"	S. h. SW	"	"	"
SW. q	19	27	43	SW. SE	"	"	"

XXXIX. JOHN BARBOUR (Transcript, p. 1357), sworn on part of pl'ff, said:

271 I took my seat on the board of supervisors at the commencement of 1874; at our September meeting in that year we talked over the matter of ordering the lands to be stricken from the lists, and not to be put on the lists, and resolved to have it done; I don't know that we ordered the auditor so to enter it upon the minutes; it was an omission on our part, at least we found at a subsequent meeting that it had not been done, and I know that I called it up at the October meeting, and said that it must be done; I enquired of Mr. Taft if it was entered in September, and he said it was not; he said the lands were all entered on the tax lists, and we said it must be stricken off, that the taxes must be cancelled at that time; I mean at the October meeting; it was my understanding that it was done at this meeting; afterwards I was told that there was no record of it; I said it was a mistake, that I knew there was a record of it, at least I was pretty sure there was a record; at the January meeting, 1875, we found that the record said nothing about it, and we then saw that it was put on the record as of the October meeting.

Cross-examination:

At the September meeting, 1874, we agreed that it should be done; I don't think that we ordered the auditor to put it right down—it was an

omission on our part; at the October meeting I consider that we did order the auditor to put it down; we made the order the same as we did other business; I called it up; there was no motion, as I know of, made and seconded; there is a great deal of business done without that; we took no formal vote, but we voted it as we did a great deal of other business; we said it should be done, and I think we directed the auditor to do it at that time; the auditor was there, and I suppose he heard; I can't say whether he did or not; I think Mr. Robbins spoke to him about it; told him that the board did not want these lands in controversy taxed for the year 1874; Taft was auditor at that time; it seems that he did not obey the board; the lands at that time (October, 1874) were on the tax books; we found they had been entered on the books, and we said they must be stricken off; that was the first action of the kind taken; it was talked over at the September meeting, and that was the only action taken up to that time;
272 we had it up again at the January meeting, and that was the last of the tax business; I am still a member of the board; in respect to making an order with reference to putting the lands on the tax books for 1875, it was the understanding of the board that they were not to be taxed; I think there was an action of the board to the effect that these lands were to be stricken from the lists of 1875; if they are on the lists for that year it is not by authority of the board; that order has never been rescinded; we passed the tax books for 1875 over from the auditor to the treasurer in the usual manner, and if he put these lands on there it is not from any action of the board; it is not expected that we (the board) will go over the tax books and see that the auditor has made no mistakes when we pass them over; of course it is done by our action, but if he makes any errors it is not expected that we will look through the tax books for them.

Redirect examination:

The order of the board I have spoken of was never rescinded; after the board made that order the lands were stricken from the tax lists (of 1874). I know nothing of these lands having been placed on the new tax lists for 1875; we supposed they were not in at all; that was the understanding; they were not to go on the lists at all.

Resolution remitting taxes for 1868–'9.

XL. (Transcript 1365½.) "Tuesday morning, September 8th, 1868, Mr. Hale, from special railroad committee appointed by the board, offered the following, to wit:

"In consideration and on condition that the B. & M. R. R. Co. shall locate the line of their road and build the same through Mills County, Iowa, via Glenwood, in said county, and also locate and build a depot at said town of Glenwood, it is hereby

"Resolved by the board of supervisors of Mills County, in the State of Iowa, That the taxes that may have been or shall be levied on the lands belonging to said railroad company in said county, shall be, and the same is hereby, remitted: Provided, That this resolution shall not be so construed as to remit said taxes for more than two years to come, in-
273 cluding also the taxes which have been and are now levied on and standing against said lands, it being the true intent and meaning of this resolution that all of said taxes which have been or may be levied

for two years in the future, so far as the board of supervisors of said county are authorized to do so according to law, are hereby remitted under the conditions and restrictions above set forth.

The ayes and nays being called for, the vote stands as follows:

Ayes—Allis, Briggs, Forrester, Lamb, Utterbeck, Wing, Summers, and Mr. Chairman—8.

Nays—Haynie and Ward—2.

Plaintiff rests in rebuttal.

Defendants' rebutting evidence:

XLI. W. H. TAFT (Transcript, 1366), being recalled for def'ts, said:

I was auditor of Mills County in 1874 and 1875. I received no instructions from the board of supervisors in September or October, 1874, concerning the striking off of any lands from the tax lists of that year. I knew that the lands in controversy were on the tax books of that year; they were not stricken from the tax books of that year.

Cross-examination:

I mean the year 1874. The tax list was delivered to the treasurer in November of that year.

XLII. M. M. ANGELL (Transcript, 1366):

I am now the treasurer of Mills County. I have not received any instructions from the board of supervisors to not collect the taxes on any lands that were on the tax books turned over to me. The lands upon which Mr. Peet paid a short time ago for the railroad company was on the tax books for 1875. Mr. Peet did not pay on any lands that were marked "swamp lands" on the books. I do not know, as a matter of fact, that the lands on which Peet paid are swamp lands.

There was nothing on these books to indicate but what the taxes on the lands were to be collected.

274 Def'ts rest, and the foregoing being all of the testimony offered or used by the pl'ff and def'ts at the final hearing of said cause.

Afterwards, on the 26th of February, A. D. 1876, final decree of said cause therein was made and entered of record, viz (Transcript, 546):

MILLS COUNTY, IOWA, }
vs.
B. & M. R. R. CO. ET AL. }

Now on this day this cause came on to be heard, and being fully submitted by the parties on the pleading, proofs adduced, and the argument of counsel, and the court having heard all things touching the issue, and being advised in the premises, finds:

1st. That so far as the issue made upon the pl'ff's petition is concerned the equities are with the def'ts. It is therefore ordered and adjudged that the pl'ff take nothing by its petition, and that the same be dismissed.

2d. So far as the def't, the C., B. & Q. R. R. Co., claims affirmative relief, to wit, a judgment for money against the pl'ff, the equities of said claim are with the pl'ff, and the relief prayed for is denied.

It is also ordered that def'ts have judgment against the pl'ff for the costs of this suit, to be taxed by the clerk.

The pl'ff and the def't, the C., B. & Q. R. R. Co., except to the judgment, and have until July 26, 1876, to settle bill of exceptions.

And on the 26th of March, 1876, pl'ff filed notice of appeal as follows (p. 548 of Transcript):

275 *Notice of appeal.*

In the district court of the State of Iowa in and for Mills County.

MILLS COUNTY, IOWA,
vs.
B. & M. R. R. CO. ET AL.

To the above-named def'ts, and to Hale & Stone and O. H. Browning, their attorneys, and to T. B. Ballard, esq., clerk of said county:

You are hereby notified that the pl'ff in said action has appealed from so much of the decree of the district court as is embraced in paragraph one thereof, to wit: "That so far as the issue made upon pl'ff's petition is concerned the equities are with the def'ts; it is therefore ordered and adjudged that pl'ff take nothing by its petition, and that the same be dismissed," and the further order "that the def'ts have judgment against the pl'ff for the costs of this suit, to be taxed by the clerk," rendered in favor of the def't at the February term thereof, and on the 26th of February, 1876, to the supreme court of Iowa, and that said appeal will come on for hearing and trial in said court at the September thereof, to be held at Council Bluffs on the 3d Monday in the month of September, A. D. 1876.

L. W. ROSS,
C. B. LAWRENCE,
D. H. SOLOMON,
Attorneys for Pl'ff.

We hereby acknowledge service of the foregoing notice at Glenwood, Mills County, Iowa, this March 24th, 1876.

HALE & STONE,
Attorneys for Def'ts.

I hereby acknowledge service of the foregoing notice at Glenwood, Iowa, this March 24th, 1876.

T. P. BALLARD, *Clerk.*

276 And on the 19th of August, 1876, the pl'ff filed a further and additional notice of appeal, with the return thereon, as follows:

In the district court of Mills County, Iowa.

MILLS COUNTY
vs.
B. & M. R. R. CO. ET AL.

To you and each of you, the above-named def'ts, notice is hereby given

that the pl'ff in said action has appealed from so much of the decree of the district court as is embraced in part one thereof as follows, to wit: "That so far as the issue made on pl'ff's petition is concerned the equities are with the def'ts; it is therefore ordered and adjudged that pl'ff take nothing by its petition, and that the same be dismissed," and the further order "that the def'ts have judgment against the pl'ff for the costs of this suit, to be taxed by the clerk," rendered in favor of the def'ts at the February term thereof, on the 27th day of February, 1876, to the supreme court of Iowa, and that said appeal will come on for hearing and trial in said court at the September term thereof, to be held at Council Bluffs, commencing on the third Monday in the month of September, 1876.

L. W. ROSS,
C. B. LAWRENCE,
D. H. SOLOMON,
Attorneys for Appellants.

We hereby acknowledge service full and complete to have been made of the above and foregoing notice of appeal for the def'ts, to wit, B. & M. R. R. Co., C., B. & Q. R. R. Co., J. W. Brooks, A. Hardy, J. N. A. Griswold, H. B. Jones, P. Eckley, W. H. Eckley, Geo. S. Wilson, S. B. Sidner, F. Schoenig, Giles Hinson, T. Crewdson, E. Vankirk, D. Cavenaugh, T. S. Godard, L. Hinson, J. V. Hinchman, for whom we have appeared on this 17th day of August, 1876.

HALE & STONE,
Attorney for said Def'ts.

We hereby acknowledge service full and complete to have been made of the above and foregoing notice of appeal to the above-named def't, Otis E. Allis, as attorneys for him on this 17th day of August, 1876.

KELLEY BROTHERS,
Attorneys.

277 Having filed intervenors for W. H. Eckley, A. Sherman, J. A Boswell, J. Wearin, L. Robbins, P. Eckley, A. Kritz, I waive notice of appeal for each of these this 17th August, 1876.

D. H. SOLOMON.

On the 28th of August, 1876, there was filed in the office of the clerk of the district court, an additional notice of appeal with return of ser vice thereon, showing that the same was duly and personally served on the following def'ts, viz:

August 22, 1876, on def'ts J. Buckingham, Benj. Buckingham, Wm. Antrim, Elias Antrim, and John Antrim.

August 23, 1876, on def'ts S. D. Davis, H. W. Summers, E.Burns, Frank Hobbs, W. T. Roll, T. Miles, J. F. Hendrie, W. E. Deem, John Van Eaton, John Haynie, George Morrow, C. Epperson, B. Gunsosly, and D. Sheady. 1

August 25, 1876, on deft's J. S. Runkles, T. W. Wright. J. F. Hamilton, P. S. Deloshmut, and H. C. Watkins.

Assignment of errors.

1. The decree of the court below is not authorized by the evidence.

2. The decree of the court below is contrary to law.
3. The decree of the court below is contrary to equity.
4. The court below erred in permitting the question (abstract, 180) to witness M. M. Angell, and in receiving in evidence his answer thereto against the objections of the pl'ff.
5. The court below erred in permitting the question (abstract, 190) to witness J. H. Wing, and in receiving in evidence his answer thereto against the objections of pl'ff.
6. The court erred in permitting questions No. 5, 7, 12, 14, 15, 17,
278 18, 20, 24, 29, and 34, and each of said questions (Abstract, 117–121) to be propounded to the witness C. W. Spaulding against the objections of the pl'ff.
7. The court erred in permitting the questions (abstract, 152) to be propounded to the witness C. E. Perkins against the objections of the pl'ff.
8. The court erred in permitting the question (abstract, 154) to be propounded to the witness W. W. Peet against the objections of the pl'ff.
9. The court erred in permitting questions No. 4, 5, 6, and 7 to be propounded to witness D. N. Smith (abstract, 164–6) against the objections of pl'ff.
10. The court erred in permitting the introduction of tax deeds in evidence (abstract, 193) against the objections of the pl'ff.
11. The court erred in permitting the introduction of lease in evidence (abstract, 194) against the objections of the pl'ff.
12. The court erred in permitting the introduction of exhibit in evidence (abstract, 194) against the objections of pl'ff.
13. The court below erred in not ruling upon the several objections made by pl'ff, and particularly indicated in assignments 6 to 12 aforesaid.
14. The court below erred in rendering judgment for cost against the pl'ff.

279 In the supreme court of Iowa, September term, 1876.

MILLS COUNTY, IOWA, APPELLANT,
vs.
THE BURLINGTON AND MISSOURI RIVER RAILROAD COMPANY, et al., appellees.

Appeal from Mills district court.

D. H. Solomon, Chas. B. Lawrence, L. W. Ross, for appellant.
Hale, Stone & Proudfit, and O. H. Browning, for appellees.
Kelley Brothers, for Otis E. Allis, appellee.

Appellant's amendment to abstract of record.

The appellant, with leave of court and consent of appellees, amends its original abstract of record in the following particular:
By inserting on page 29 thereof, after "duly verified," the following:
"Feb. 8th, 1876, defendants filed motion to strike paragraph 2 of
280 amendment to petition, filed Feb. 7th, 1876, on the ground of redundancy and irrelevancy. Motion sustained, and plaintiff excepted."

By inserting on page 76 thereof, at the end of the examination in chief of E. C. Bosbyshell, the following as testimony of said witness:

I asked him (Joy) whether he thought the road would go through Mills County, and he said "he did not know." He said "they hated to run a road through the county when the people were fighting them."

I asked him what the probability was. He said "he did not know; they did not want to run a road where the people were fighting them; it was very hard to build a road when the people were fighting all the time."

I said, "I don't know as we are fighting you any."

"Well," he said, "this suit."

I says, "Why can't you fix up that suit?"

He said "he did not know; they were willing to fix it up; you folks, if you want that road through Mills County, ought to go to work and settle up that suit; have that settled (something to effect), you and the Fremont County people."

I says, "Us and the Fremont County people could not go to work and settle it, because they want the road as bad as we do, and they would be independent, and we undertake to tell them we was going to settle it for the purpose of having the road through here, anything of that kind, they would say, we won't settle it unless we will have a road through there. They would be independent of us."

He made the remark that "nobody at these times was independent of a railroad."

This was several years before they commenced work here, and it was before the St. Joe road was built.

By inserting on page 108 thereof, at end of testimony of C. E. Perkins, and as testimony of said witness, the following: On the 31st of December, 1872, the directory of the B. & M. R. R. Co. consisted of said J. W. Brooks, pres.; Alpheus Hardy, L. Tuckerman, J. A. Burnham, J. M. Forbes, N. Thayer, R. S. Watson, C. E. Perkins, and J. F. Joy; and at the same date the directory of the C., B. & Q. R. R. Co. consisted
281 of said J. M. Walker, pres.; J. W. Brooks, J. A. Burnham, J. M. Forbes, N. Thayer, R. S. Watson, J. F. Joy, J. N. Dennison, Erastus Corning, J. C. Green, S. Bartlett, and C. F. Cotton.

By inserting on page 105, after the end of paragraph XVII, and as a part of said paragraph, the following:

Plaintiff further offered in evidence part of the record of the district court of Fremont County, Iowa, in the case entitled Fremont County vs. B. & M. R. R. Co., viz, the pleadings and decree of said court, and the opinion and judgment of the supreme court of Iowa, in the same case. (Objected to by defendants as immaterial, irrelevant, and incompetent.)

Objection sustained by the court. Plaintiff excepted.

The following is a copy of said decree in the district court:

FREMONT COUNTY *vs.* THE BURLINGTON & MISSOURI RIVER RAILROAD COMPANY.	No. 126.	Ch.

Now at this time this cause coming on to be heard, and the court having heard and examined the allegations of the parties, the evidence submitted,

and the arguments of counsel, and being fully advised in the premises, finds the facts stated in the petition to be true, and that the plaintiff is entitled to the relief therein prayed for.

It is therefore ordered, adjudged, and decreed by the court that the title in fee simple to the lands described in the plaintiff's petition, to wit:

(Here follows a description of the lands.)

Containing in the aggregate 12,754 and 19-100 acres, and every part and parcel thereof, is legally vested in the plaintiff; and it is adjudged and decreed by the court that the said plaintiff, to wit, Fremont County, is the owner in fee simple of said lands, and is entitled to the uninterrupted control, use, benefit, and enjoyment of the same.

And it is further adjudged and decreed that the claim of the defendant, to wit, The Burlington & Missouri River Railroad Company, to said lands, and to each and every parcel thereof, is illegal, null, and void.

282 And it is further adjudged that the defendant pay the costs of this suit, taxed at dollars, and that execution issue therefor.

For copy of opinion in supreme court see 22 Iowa, 91–130, and for form of judgment thereon see Abs., 105.

D. H. SOLOMON,
C. B. LAWRENCE,
L. W. ROSS,
Attorneys for Appellant.

Additional assignments of error.

Appellant, with leave of court and consent of counsel, here files four additional assignments of errors:

15. The court erred in sustaining defendant's motion to strike the second paragraph of plaintiff's amendment to the petition, filed Feb. 7th, 1876, to the sustaining of which plaintiff at the time excepted. (Ab., p. 29; amendment to Ab., p. 1.)

16. The court erred in sustaining defendant's objection to plaintiff's questions propounded witness Russell, and in refusing to permit said witness to answer the same, to which ruling and refusal the plaintiff at the time excepted. (Ab., 110–111.)

17. The court erred in sustaining defendant's objection to the record in the Fremont County case as offered in evidence and in refusing said record as evidence, to which ruling and refusal plaintiff at the time excepted. (Ab., p. 105, and amendment to Ab., p. 3.)

18. The court erred in admitting swamp land book in evidence as offered by defendants (Ab., p. 184–5) against the objections of the plaintiff, to which ruling and admission the plaintiff excepted at the time.

D. H. SOLOMON,
C. B. LAWRENCE,
L. W. ROSS,
Attorneys for Appellant.

283 THE CHICAGO, BURLINGTON AND QUINCY Railroad Co., app'l't,
vs.
MILLS COUNTY, IOWA.

Appeal from Mills dist. court.

And afterwards, to wit, on the 22d day of March, A. D. 1877, the following record entry appears:

On this day this cause is submitted to the court on printed argument of counsel.

284 THE CHICAGO, BURLINGTON & QUINCY Railroad Co., app'l't,
vs.
MILLS COUNTY, IOWA.

And on the 19th day of October, A. D. 1877, appears the following record entry, to wit:

In this cause the court, being fully advised in the premises, file their written opinion reversing the judgment of the district court. It is therefore considered by the court that the judgment of the court below be, and it hereby is, reversed and set aside; that further proceedings be had in said court not inconsistent with the opinion of this, and that a writ of procedendo issue accordingly; and further, that the appellee pay the costs of this appeal, taxed at $, and that execution issue.

285 THE CHICAGO, BURLINGTON & QUINCY Railroad Co., app'l't,
vs.
MILLS COUNTY, IOWA.

And now, on this 8th day of October, A. D. 1879, the def't files in the office of the clerk of the supreme court their petition for writ of error in this cause, with order of the chief justice in words and figures as follows, to wit:

The United States of America to the honorable the supreme court of the State of Iowa:

Your petitioner, Mills County, Iowa respectfully represents:

First. That in the record and proceedings, and also in the ren-
286 dition of a plea made in said court Oct. 19th, A. D. 1877, being the highest court of law & equity in the State of Iowa in which a decision could be had in the certain suit between The Chicago, Burlington & Quincy Railroad Co. against plaintiff and appellee, Mills County, def't and appellant, there was drawn in question the validity of a statute of the United States, and the said decision was against its validity; and there was drawn in question the validity of an authority exercised under the United States, and the decision was against its validity; and there was drawn in question the validity of a statute of the State of Iowa, on

the ground of their being repugnant to the laws of the United States, and the decision was in favor of their validity; and there was
287 drawn in question the validity of an authority exercised under the laws of the State of Iowa, on the ground of its being repugnant to the laws of the United States, and the decision was in favor of its validity; and there was drawn in question the validity of a construction of a statute of the United States, and the decision was against the right and title specially claimed under said authority.

Second. Your petitioner is about to remove said cause or writ of error to the Supreme Court of the United States, and he herewith presents a bond for costs only in the sum of five hundred dollars, with good and sufficient sureties, and also a citation, and prays the approval of said bond and the signing of said citation by the chief justice of your said
288 court, to the end that said writ of error may be allowed, and said cause removed thereunder to said Supreme Court of the United States.

Dated Oct. , 1879.

MILLS COUNTY,
By CHARLES B. LAWRENCE,
D. H. SOLOMON, AND
L. W. ROSS, *Solicitors.*

Writ of error allowed Oct. 7, 1879.

JOSEPH M. BECK,
Chief Justice of the Supreme Court of the State of Iowa.

289 THE CHICAGO, BURLINGTON & QUINCY Railroad Co., app'l't,
vs.
MILLS COUNTY, IOWA.

And on this 11th day of October, 1879, appears the bond in said case in words and figures as follows, to wit:

THE UNITED STATES OF AMERICA, *ss:*

Know all men by these presents that we, Mills County, as principal, and Josiah Wearin, L. Robbins, & R. Mickelwait, as sureties, are held and firmly bound unto the Chicago, Burlington & Quincy R. R. Co., its successors and assigns, in the full and just sum of five hundred dollars, to be paid to the said Chicago, Burlington & Quincy Railroad Co., its successors or assigns; to which payment, well and truly to be made,
290 we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals, and dated this 7th day of October, in the year of our Lord one thousand eight hundred and seventy-nine.

Whereas lately, at a term of the supreme court of the State of Iowa, in a court commencing at the city of Dubuque, in the State of Iowa, on the 3d Monday in October, A. D. 1877, in *and* a suit depending in said court, between the above-named Chicago, Burlington & Quincy R. R. Co., as pl't'ff, and Mills County, as def't, final judgment was rendered against the said Mills County, and said Mills County having obtained a writ of

error and filed a copy thereof in the clerk's office in said court to
291 reverse the judgment in the aforesaid suit, and a citation directed to the said Chicago, Burlington & Quincy Railroad Co., plaintiff above named, citing and admonishing to be and appear at a Supreme Court of the United States, to be holden at the city of Washington, on the second Monday of October next:

Now, the condition of the above obligation is such that the said Mills County shall prosecute its writ of error to effect, and answer all costs, if it fails to make its plea good, then the above obligation to be void, else to remain in full force and virtue.

[SEAL.] 1 MILLS COUNTY IOWA,
By H. F. WILSON,
Auditor & Ex-officio Clerk B'd of Supervisors.
2 JOSIAH WEARIN. [SEAL.]
3 LEWIS ROBINS. [SEAL.]
4 R. MICKELWAIT. [SEAL.]

Signed, sealed, & delivered in our presence.

The above bond & sureties thereto approved at I'a.
JOSEPH M. BECK,
Chief Justice of the Sup. Court of Iowa.

292 STATE OF IOWA,
Mills County:

We, Josiah Wearin, Lewis Robbins, & R. M. Mickelwait, the sureties subscribing the above bond, being first duly sworn, upon our several oaths say, that we are respectively citizens and residents of the county of Mills in the State of Iowa, and that we are respectively worth on real property situated in said county and State and not exempt from execution the sums of one thousand dollars over and above our indebtedness, respectively.

JOSIAH WEARIN.
LEWIS ROBBINS.
R. M. MICKELWAIT.

Sworn to before me & subscribed in my presence by the said Josiah Wearin, Lewis Robbins, & R. Mickelwait, this 7th day of October, A. D. 1879.

[SEAL.] J. E. ROBINSON,
Clerk of the Dist. Court of Iowa for Mills Co.

293 THE CHICAGO, BURLINGTON & QUINCY Railroad Co., app'l't,
vs.
MILLS COUNTY, IOWA.

And on the 8th day of October, A. D. 1879, there was filed in this cause the original writ of error in words and figures as follows:

294 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the supreme court of the State of Iowa, greeting:

Because in the second and proceedings, and also in the rendition of the

judgment of a plea, which is in said supreme court before you, being the highest court of law equity of the State aforesaid in which a decision could be had in the suit between The Burlington and Quincy Railroad Co., plaintiff, and Mills Co., Iowa, defendants, wherein was drawn in question the validity of a statute of the United States, and the decision was against its validity; and wherein was drawn in question the validity of an authority exercised under the United States, and the decision was against its validity; and wherein was drawn in question the validity of statutes of the United States on the ground of their being repugnant to the laws of the United States, and the decision was in favor of their validity; and wherein was drawn in question the validity of an authority exercised under the laws of the State of Iowa on the ground of its being repugnant to the laws of the United States, and the decision was in favor of its validity; and
295 wherein was drawn in question the validity of a consideration of a statute of the United States, and the decision was against the right and title specially claimed under said statute, a manifest error hath happened, to the great damage of appears by its complaint: We being willing that the error, of any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid on their behalf, do command you, if judgment therein be given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October, 1879, in the said Supreme Court to be there and then held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct this error what of right and according to the customs of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court, the 8th day of Oct., A. D. 1879, and of our Independence the 104th year.

[SEAL.] EDWARD R. MASON, *Clerk.*

(Stamped:) Filed Oct. 8, 1879. E. J. Holmes, clerk s. c.

296 THE CHICAGO, BURLINGTON & QUINCY Railroad Co., app'l't,
vs.
MILLS COUNTY, IOWA.

And on this 8th day of October, 1879, the citation in this cause was filed with proof of service of same.

THE UNITED STATES OF AMERICA, *ss:*

To the Chicago, Burlington & Quincy Railroad Co., greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States to be holden at the city of Washington, on the 2d Monday of October, 1879, pursuant to a writ of error filed in the clerk's office of the supreme court of Iowa, wherein Mills County, Iowa, is
297 pl't'ff in error and you are defendants in error, to show cause, if any

there be, why the judgment of said supreme court of Iowa rendered against the said pl't'ff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 7th day of October, in the year of our Lord one thousand eight hundred & seventy-nine.

[SEAL.] JOSEPH M. BECK,
Chief Justice Supreme Court of Iowa.

OCT. 7, 1879.

298 UNITED STATES OF AMERICA,
State of Iowa, County of Pottawattamie, ss:

I, C. H. Gilmore, being first duly sworn, on my oath say that on the 9th day of Oct., A. D. 1879, at the office of The Chicago, Burlington & Quincy Railroad Co., in Council Bluffs, in said county & State, I served the foregoing citation on the said Chicago, Burlington & Quincy Railroad Co., def't in error, by reading the same to and in the hearing of J. O. Phillippi, general agent of said company, and by leaving with him in said office a true copy thereof.

C. H. GILMORE.

Fees: Service, 50; copy, 25; mileage, 10—85c. P'd by pl't'ff in error.

Sworn to before me and subscribed in my presence by the said C. H. Gilmore, this 9th day of October, 1879.

[SEAL.] J. H. KEITH,
Notary Public.

299 I, E. J. Holmes, clerk of the supreme court of Iowa, hereby certify the foregoing to be a true, full, and complete copy of the abstracts, record entries, petition for writ of error, appeal bond, citation, and original writ of error, as true, full, & complete, as the same appears on file and of record in my office.

Witness, E. J. Holmes, clerk of the supreme court of Iowa, with the seal of said court hereto attached at my office, at Des Moines, this 10 day of October, A. D. 1879.

[SEAL.] E. J. HOLMES,
Cl'k Supreme Court of Iowa.

(Indorsement on cover:) No. 192. Mills County, Iowa, plaintiff in error, vs. The Chicago, Burlington & Quincy Railroad Company. Iowa sup. c't. Filed 6th March, 1880.

(Stamp:) Office Supreme Court U. S. Filed Mar. 6, 1880. D. W. Middleton, clerk.

17-557

OFFICE SUPREME COURT U. S.
FILED
JAN 3 1883
A. McKENNEY, CLERK

Supreme Court of the United States,

October Term, A. D. 1882.

ERROR TO THE SUPREME COURT OF IOWA.

MILLS COUNTY, IOWA,

191 *vs.* *IN EQUITY.*

THE BURLINGTON & MISSOURI RIVER R. R. CO., *et. al.*

AND

THE CHICAGO, BURLINGTON & QUINCY R. R. CO.,

192 *vs.* *AT LAW.*

MILLS COUNTY, IOWA.

ARGUMENT—BRIEF.

On behalf of Mills County
by
D. H. SOLOMON and C. B. LAWRENCE, Counsel for Mills County.

G. T. WALKER & CO., PRINTERS, COUNCIL BLUFFS, IOWA

In these cases (Nos. 191 and 192 in this court) the parties thereto filed therein while the same were pending in the supreme court of Iowa, a stipulation as follows, to-wit:

"It is agreed that said causes (6,599 and 6,603) shall be consolidated, and that for such purposes counsel on both sides may use in common the abstracts of pleadings and evidence in both cases.

See page 275 (marginal) of abstract in case No. 191, and page 66 (marginal) of abstract in case No. 192, as printed by the clerk of this court.

The supreme court of the State of Iowa says:

"The action first above named [191 here] was brought to set aside certain deeds executed by the plaintiff, Mills county, to the defendant, the Burlington & Missouri R. R. Co., the Chicago, Burlington & Quincy R. R. Co., are made defendants as claiming title through the Burlington & Missouri River R. R. Co."

"The action last above named was brought by the Chicago, Burlington & Quincy R. R. Co., recover of Mills county the sum of ten thousand dollars. Both claims originated in the same transaction and the two cases are submitted together."

See 47 Iowa, pages 66 and 67.

Appellants, Mills county, Iowa. The plaintiff in error in

each case has prepared and intend the following to be its brief and argument in each case:

The numbers used in this argument in referring to pages in the abstracts are the marginal numbers. The paging of the abstract in case No. 191 is not identical with that of the abstract in case No. 192, ~~and to prevent confusion and as far as possible save trouble, both numbers are inserted.~~

In all except Mr Ross's Argt. use Ab in 191,
but for this " " " " 192.

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S. T. WALKER & CO., PRINTERS, COUNCIL BLUFFS, IOWA

STATEMENT.

This is a controversy about swamp lands, and the proceeds of the sales thereof.

The plaintiff (in the equity cause), Mills county, Iowa, alleges that the lands in controversy are swamp lands, granted to the state of Iowa, under an act of Congress, entitled, "An act to enable the state of Arkansas and other states to reclaim the swamp lands within their limits."—*Approved September 28th, 1850.*

That it is trust property, and as such is owned and held by plaintiff, under the said act of Congress, which is entitled, "An act to confirm to the several states the swamp and overflowed lands selected under the act of September 28th, 1850, and the act of the 2d of March, 1849.—*Approved March 3d, 1857.*

Together with an act of the general assembly of the state of Iowa, which is entitled, "An act to dispose of the swamp and overflowed lands in the state of Iowa, and to pay the expenses of selecting and surveying the same."—*Approved January 13th, 1853.*

And other acts of the said general assembly supplemental thereto.

2d: That there is, and for a long time has been needed the funds with which to drain and reclaim swamp and overflowed lands in Mills county, Iowa, and that it will require all of the funds that can be realized from the sale of all the lands in con-

troversy to drain and reclaim the same, and make and establish the levees and drains that are and will be needed for that purpose. (See plaintiff's abs., page 29.)

3d. That by act of congress of May 15th, 1856, the United States granted also to the state of Iowa certain lands for the purpose of aiding the building of a railroad from Burlington, Iowa, to a point on the Missouri river, at or near the mouth of Platte river, in Nebraska.

4th. That the state of Iowa accepted each of these grants, with their respective trusts imposed; and bestowed the land under the latter grant; upon the Burlington and Missouri River Railroad Company, defendant in this case, by act of the legislature of Iowa.

That the defendant Railroad Company accepted this grant according to its terms, and has received lands thereunder.

That the particular tracts of lands to which the Railroad Company was entitled could uot be fixed upon until the location of the road, which is alleged to have been made through Mills county, *via* Glenwood, on the 24th day of March, 1857.

That by the acceptance of the grant, and the location of the road, the Company became bound, under the obligations of a contract, with the state of Iowa, and especially with the people of Mills county, to build and construct its road on the line so located through Mills county. (See plaintiff's abs., page 8, ¶ 6.

That a conflict soon arose between the Railroad Company and the county as to the ownership of about 23.000 acres of swamp lands, which the county claimed under the "swamp

land grant act" of congress of 1850, and the Railroad under the grant second above mentioned.

That a petition in equity was filed by the county against the Railroad Company, to quiet title, and a decree rendered in the District Court finding the title in the county. That on successive appeals to the the Supreme Courts of Iowa and the United States the decree of the District Court was affirmed, the decree of affirmance in the latter court having been rendered on the 7th day of February, A. D. 1870, after the case had been fully contested and submitted on its merits by both parties.

That after said decree of the District Court (in equity) had been affirmed in the Supreme Court of Iowa, at the June term, 1867, and while the suit (which was in regard to trust property: a trust imposed by act of congress) was pending in the Supreme Court of the United States (in chancery) the Burlington and Missouri River Railroad Company, one of the parties thereto, by running *scare lines*, or mock surveys, and by threats that if the suit was not settled it would abandon the route, fixed as aforesaid, and build its road through other and competing points to one side of the line so fixed through Mills county, and by other fraudulent means, procured, in the fall of 1868, the Board of Supervisors of Mills county—the other party to the suit—and the trustee, then in duty bound by statute and decree already rendered to carry out the trust, to entertain a proposition for a contract at variance with and in violation of that statute and decree. The legal effect of which proposition is alleged in the petition. But the proposition is here inserted in full, as the same is set out in an exhibit to the petition, and is as follows, to-wit :

"In order to settle and finally adjust the law suit now pending in the Supreme Court of the United States, wherein Mills Coun-

ty, in the State of Iowa, is plaintiff, and the Burlington and Missouri River Railroad Company is defendant, and secure the completion of said railroad through Mills county, *via* Glenwood, in said county, we, the undersigned, agents of said county, submit the following proposition to the Board of Directors of said Railroad Company, to-wit:

"There are in dispute, between the parties to the said law suit, twenty-three thousand, three hundred and sixteen acres. For the purpose of having our proposition understood, we acknowledge that we owe you acres of land to the amount of 23,316, to pay which we have and offer you odd sections vacant (most of which is part of the 23,316 acres), and even sections patented to the county and unsold—in the aggregate 9,080; balance of land due you, 14,236 acres. For further payment we have and offer to you of the odd sections (about all of which is of the 23,316 acres claimed by you), subject to pre-emption made through the county, acres to the amount of (on which nothing has been paid to the county), 4,660. Of these pre-empted lands we estimate that about one-half of the pre-emptions are fraudulent, and ought not to be recognized; but the county must ask, where *bona fide* improvements have been made on the same, the pre-emptors must be secured in their rights to the same, and have the privilege of purchasing at $1.25 per acre of the county, or company, which amount shall in any event go to the Railroad Company. Now you will have land for land, subject only to the pre-emptors claims, until there will be due you, in acres, 9,576.

"The remainder, 9,576 acres, belongs to *bona fide* settlers and purchasers, who, we must insist, shall bn protected by the county, and, as we have *paid you all the land we have*, we offer you for this balance, *ten thousand dollars in money*.

"The Company should understand that the balance of 9,576 acres is the land, portions of which it has been settling with our individual citizens for, and there is included in the 9,576 acres all the lands the Company has sold to citizen settlers at $1.25 per acre. With this understanding, the $10,000 balance we offer you will be just as much less than 9,576 acres, as the Company has thus sold, and therefore our pay would, perhaps, amount to $1.50 or more.

"It is understood that the suit now pending shall be continued, by agreement of the parties, from term to term, until the condition of this contract, or proposition, shall be complied with.

"It is also further understood that the foregoing proposition shall not be binding upon the county of Mills, unless said Railroad Company shall complete said railroad through Mills county, *via* Glenwood, and build a depot at Glenwood, in said county; and in case said Railroad Company shall fail or neglect to build said railroad through Mills county, by Glenwood, and also build and establish a depot at Glenwood, in said county, then, and in that event, the said law suit shall stand for final hearing in the Supreme Court of the United States, the same as if this proposition had never been made.

"In case the suit shall be settled on the basis of this proposition, each party shall pay their own costs. The matter of transferring the land, whether the county shall deal with the purchasers and pre-emptors, or whether the Railroad Company, under the restrictions indicated, the county is not particular about, but will agree to what may seem most practicable.

"The amount, in acres, as stated above, may not be exactly correct, and probably is not, but it is believed to be nearly so; but we wish it understood that the Company *shall have all the*

swamp lands the county holds, or is entitled to, in Mills county, Iowa, subject only to the conditions indicated in the foregoing.

"Witness our hands this July 13th, 1868."

The petition further alleges that said proposition and contract was and is void, because the lands to which it referred had long before vested in the county of Mills as swamp lands, and that it was a proposition and contract to devote swamp lands to the making of a railroad through Mills county.

That the lands could not be so devoted without submission to popular vote, which was never done until June 19th, 1871, and was then defeated, as is hereafter stated.

The first three sections of the Iowa statute, to which reference is here made, and which plaintiff claims to have been in this manner ignored and violated, are as follows, to-wit:

Sec. 984. "Be it enacted by the General Assembly of the State of Iowa, That it shall be competent and lawful for the counties owning swamp and overflowed lands to devote the same, or the proceeds thereof, either in whole or in part, to the erection of public buildings for the purpose of education, the building of bridges, roads and highways; for building institutions of learning, or for making railroads through the county or counties to whom such lands belong; provided, that before any of said land, or the proceeds thereof, shall be so devoted to any of the purposes aforesaid, the question whether the same shall be so done shall be submitted, at some general or special election, to the people of the county."

Sec. 987. (2.) "The proper officer or officers of any county may contract with any person or company for the transfer and conveyance of said swamp or overflowed lands, or the proceeds

thereof, or otherwise appropriate the same to such person or company, or to their use, for the purpose of aiding or carrying out any of the objects mentioned in the first section of this act, which said contract shall be reduced to writing and signed by the respective parties or their lawful authorized agents.

Sec. 988. (3.) "Before such contract shall be *of any force or validity* the same shall be published for four weeks, immediately preceding some general or special election, in some newspaper published in the county, and if there be none published therein, then three copies of the same shall be posted in three of the most public places in each township in the county for the length of time aforesaid, together with a proclamation of the proper officers, and directing how and where the vote thereon shall be taken, and returns made and canvassed, and in what manner or form the people shall vote thereon; and if it shall appear that a majority of the people, in any county voting thereon, are in favor of the contract or proposition submitted to them, then and in that case such contract or proposition shall be binding upon the parties thereto; but if the *majority* of the people voting on such proposition are *against* the same, then it *shall be null and void;* provided, that *no sale, contract or other disposition* of said swamp or overflowed lands *shall be valid*, unless the person or company to whom the same are sold, contracted or otherwise disposed of, shall take the same subject to all the provisions of the acts of congress of September 28th, 1850, and shall expressly release the state of Iowa and the county in which the lands are situate from all liaiblity for reclaiming said land."

These sections of the revision were in full force and effect when the arrangement of 1868 was made, having been approved March 22d, 1858.

The petition further alleges that notwithstanding said propo-

sition and contract had not been submitted to popular vote as required by this statute, the Railroad Company have induced the Board of Supervisors to convey the swamp lands to the Railroad Company by several deeds, which are described in the petition, and copies of which are attached as exhibits.

That said deeds are a cloud upon petitioners title. That the supposed contract referred to, however apparetly amounting to a compromise of the suit, was not regarded or treated as a compromise or settlement by either party, but that the suit to which it referr d was stoutly contested, and finally submitted by both parties, to be decided on the record and the merits of the case in the Supreme Court of the United States.

That the Board of Supervisors had no lawful right or authority to make such a compromise, which involved the diversion of a trust fund and a surrender by the agents of the whole of the subject-matter involved in their principal's suit, after decree rendered in its favor.

That said proposition or contract was not, nor was regarded, as a compromise, but was, in reality, a *donation* to the Railroad Company, upon the consideration that it would do what it was already bound to do, and an attempt to devote swamp lands and the proceeds thereof to the building of a railroad through the county of Mills.

That after the deeds referred to had been executed, delivered and recorded, the Commissioners of Mills county, at their September meeting, in 1871, ordered the pretended contract to be submitted to popular vote, at a general election, which was duly had, and at which 357 votes were cast for affirming said contract and 1,031 against affirming it.

That a court of equity alone can afford relief.

That the defendants' Forbes, Kidder and Griswold claim to have some interest in the property, and hence are joined that they may assert their rights.

That after the taking of the vote, as above stated, the result was by mistake, erroneously returned by the board of canvassers, and entered as being 357 votes against affirming said propositon, and 1,031 in favor of its ratification.

Prays that any claim of the railroad company through any congressional or legislative act, or any thing done in pursuance thereof may be declared *res adjudicata* in favor of petitioner.

That said contract and deeds be declared to have been obtained by means of fraud and circumvention, to be inoperative, null and void, that they were without consideration and were *ultra vires*, and that said railroad company acquired nothing thereby.

That the proposition when submitted to popular vote, failed of ratification, and that the record of the convassers of said vote may be corrected.

PRAYER FOR GENERAL RELIEF.

The petition and each amendment thereto are duly verified and therefore evidence.

The defendant, railroad company demurred. The demurrer was argued and over-ruled.

The Chicago, Burlington & Quincy Railroad Company having caused its-self to be made a co-defendant as the successor to the rights of the Burlington & Missouri River Railroad Company, then filed an answer. It is unnecessary to state the the answer in detail. It denies the fraud alleged in the bill, claims title to the lands in controversy and relies upon the arrangement made between the county and the railroad company in October, 1868, and the deeds made by the county in pursuance thereof, as binding upon the county, and also relies upon the taxes paid upon these lands by the company to the county, taken in connection with said deeds as an estoppel upon the county. The answer also sets up that the Chicago, Burlington & Quincy Railroad Company is an innocent purchaser for a valuable consideration from the Burlington & Missouri River Railroad Company, but the exhibit attached to the answer shows that the so called purchase was merely a consolidation of the stock of the two companies.

Such answer shows further the various devices to which the defendant and their allies resorted in order to lay the foundation for an estoppel against the county by causing and procuring the officers of the county to enter the land for taxation and sell the same for delinquent taxes and by purchasing at such sales or buying from others, certificates of purchases made thereat by such others.

Mills county is the sole plaintiff. The principal defendants are the B. & M. R. R. Co. and the C., B. & Q. R. R. Co., lately consolidated and doing business under the name and style of the C., B. & Q. R. R. Co.

The defendants, Forbes and Kidder, disclaim any present interest in the controversy (abstract 29). The defendants, Brooks, Hardy and Griswold do not disclose either by answer

or by evidence the character of their interest in the controversy. The defendants, Samuel Masters and 85 others have answered in part and in part made default.

From pleadings filed by these last named defendants, it appears that they claim under and through the B. & M. R. R. Co. except in the case of H. B. Jones.

The case came on to be heard upon the bill, answer, replication and proofs, and the district court rendered a decree dismissing the petition.

From this decree the petitioner appealed to the supreme court of Iowa, and at its December term, 1877, the judgment of the court below was affirmed by said supreme court, (see 47 Iowa, p. 75), and from that judgment the petitioner here and now appeals to this court.

THE SUBJECT OF CONTROVERSY.

The record discloses that the lands in controversy are all swamp lands, and that the contract and deeds sought to be set aside and vacated, all relate to swamp lands, and that the proceeds of the sales of said lands which it is sought in this action to be recovered and restored are trust property, and so made under a Federal statute, and the diversion of such land and proceeds is a violation of Federal law and Federal authority, and it does appear that this question must have been raised, presented and decided by the State court against the right claimed or asserted by the plaintiff in error under statutes and other authority of the United States, and that such a decision was necessary to the judgment or decree rendered in the case, and it is claimed that such decision is wrongfully made.

It is claimed also that there is no other matter or issue adjudged by the State court sufficiently broad to maintain the decree notwithstanding this error, and that the question of Federal law and authority must control the whole case, and that the facts in this case disclose a scheme, which is in violation of the State statute which provides for the execution of the trust imposed upon the State by acts of Congress making the county the agent of the State to carry out the trust.

It is claimed that the powers of the county, under the State statutes, are to be interpreted in this decision, in the light of the Federal statute, as their real source. These are the questions involved aggressively. Defensively, there is drawn into the case a discussion of the doctrine of estoppel, growing out of the alleged taxation of these lands by the county.

The other case, that of the C., B. & Q. R. R. Co., plaintiff was brought by the plaintiff to recover of Mills county the sum of ten thousand dollars. The claim in that case and in the one just presented originated in the same transaction, and the two cases were consolidated and submitted together, and so treated in both the district court and the supreme court of Iowa.

Mills County, Iowa,
vs.
The Burlington & Missouri River R. R. Co., *et al.*

In Equity

ASSIGNMENT OF ERRORS.

1st. The decree of the court below is not authorized by the evidence.

2d. The decree of the court below is contrary to law, to Federal statutes and Federal authority, in this it violates
the Swamp Land grant of Sept 28th 1850
the confirmatory act of March 3rd 1857
the decree of this court of Feb 7th 1870 in favor of Plaintiff.

3d. The decree of the court below is contrary to equity.

4th. The court below erred in permitting the question (abstract page 180) to witness M. M. Angell and in receiving in evidence his answer thereto against the objections of the plaintiff at the time made, to-wit:

"*1.* The lands described in the list are of the class known as swamp lands, and not taxable until after a valid sale thereof bo the county, and said lands being still owned by the county the list offered is in controvention of law and works no estoppel.

"*2.* That upon the issues made, this paper and any statement of the witness in reference to the same, are incompetent."

Which objections were at the same time overruled and to which ruling the plaintiff at the time excepted.

5th. The court erred below in permitting the question (abstract 190) to witness J. H. Wing and in receiving in evidence his answer thereto against the objections of plaintiff at the time

made, to-wit: That it was not the best evidence of the facts sought to be proven, being expressed in resolution of appointment, which objection was overruled by the court to which ruling the plaintiff at the time excepted.

6th. The court erred in permitting questions Nos. 5, 7, 12, 14, 15, 17, 18, 20, 24, 29 and 34, and each of said questions (abstract 117—121) to be propounded to the witness, C. W. Spalding against the objection of plaintiff and made and entered at the time and for the reasons stated at length on said pages 117—121.

7th. The court erred in permitting the questions (abstract 152) to be propounded to the witness, C. E. Perkins, and objected to at the time by plaintiff as imcompetent, irrelevant and immaterial.

8th. The court erred in permitting the questions (abstract 154) to be propound to the witness, W. W. Peet; objected to by the plaintiff at the time as being incompetent, irrelevant and immaferial.

9th. The court erred in permitting questions Nos. 4, 5. 6. and 7 to be propounded to the witness D. N. Smith (abstract 164—6) against the objections of the plaintiff.

10th. The court erred in permitting the introduction of tax deeds in evidence (abstract 193) against the objections of the plaintiff made in writing and filed at the time, as follows, to-wit:

1. Because the lands described in said deeds are of the class known as swamp lands, and being swamp lands are not subject to taxation until after a valid sale thereof by the county,

and said deeds being upon lands still owned by the county, they are in controvention of the statute and work no estoppel.

2. The Treasurer is guided by the statute in the discharge of his duties. Under the statute there was no power to tax the lands. Therefore; his act being unauthorized, is not the act of the county and the county is not estopped from denying the validity of his acts in executing the deed.

3. Upon the issues made the deeds and each of them are incompetent, irrelevant and immaterial. (For the contents of these deeds see abstract page 63—4).

11th. The court erred in permitting the introduction of the lease from the B. & M. R. R. Co. to the C., B. & Q. R. R. Co. in evidence (abstract 194) against the objections of plaintiff and for the reasons made and filed at the time, as follows, to-wit:

1. Because the lease only purports to be an agreement to convey to the consolidated company and is not in itself a conveyance and hence is incompetent to show titlle in said C., B. & Q. R. R. Co.

2. Because upon the issues made said instrument is incompetent, irrelevant and immaterial. (This lease will be found in appellant's abstract page 50 to 54).

12th. The court erred in permitting the introduction in evidence of "Exhibit E" to the answer of the C., B. & Q. R. R. Co. (ahstract 194) against the objection of the plaintiff made at the time, as follows to-wit:

1. The lands described are of the class of lands known as

swamp lands and being such, the same already belonged to the county and the county took nothing by said deeds, the county owned the lands before and acquired no other or further title by the deeds, and hence the county is not estopped from showing that the deeds are void.

2. The deeds referred to are mere quit claim deeds, and of theselves afford no evidence of either good faith or valuable consideration.

3. Upon the issue made the list and deeds are incompeteut, irrelevant and immaterial. (For copy of these deeds see abstract 48—9.

13th. The court below erred in not ruling upon the several objections made by plaintiff and particularly indicated in the foregoing assignments Nos. 6 to 12 inclusive, which were not waived.

14th. The court below erred in rendering judgment for cost against plaintiff.

15th. The court below erred in sustaining defendant's motion to strike the 2nd paragraph of plaintiff's amendment to its petition from the files, which amendment was filed February 7th, 1876, and is in the words following :

"2. That there is, and for a long time has been, needed, funds with which to drain and reclaim swamp and overflowed lands in Mills county, Iowa, and that it will require all the funds that can be realized from the sale of all the lands in controversy to drain and reclaim the same, and make and establish the levees and drains that are and will be needed for that purpose. Plain-

tiff reiterates all its former statements and prayers herein made."

To the sustaining of which the plaintiff at the time excepted. (abstract page 29, amendment to abstract page 1).

16th. The court erred in sustaining defendant's objection to plaintiff' questions propounded to witness Russell and in refusing to permit said witness to answer the same, to which ruling and refusal the plaintiff at the time excepted. (Abstract 110—111).

17th. The court erred in sustaining defendant's objection to the record in the Fremont county case as offered in evidence by plaintiff and in refusing said record as evidence, to which ruling and refusal plaintiff at the time excepted. (Abstract page 105 and amendment to abstract page 3).

18th. The court erred in not sustaining defendant's motion to suppress portions of the deposition of J. M. Walker, and in not ruling upon said motion. (Abstract 162).

19th. The court erred in not ruling upon motion of plaintiff to suppress portions of the deposition of Henry Stong. (Abstract 163).

20th. The court erred in admitting swamp land book in evidence as offered by defendant (abstract page 184—5) against the objections of plaintiff to its ruling and admission, and plaintiff objected at the time, as follows :

1. To the book as concluding the county in regard to the title she may have had in the lands, also because the book is not the best evidence as to contracts or as to title.

2. To the book as evidence of the sale of any other lands except those by the county of lands, in controversy to private citizens prior to to the institution of the first suit by Mills county *vs.* the B. & R. R. Co., and also sales prior to the alleged compromise of 1868.

21st. The foregoing assignment of errors was made to the rulings and action of the district court, and are now here made and assigned to rulings and decisions of the supreme court of Iowa.

22d. The supreme court of Iowa erred in offirming the judgment of the district court.

The Chicago, Burlington & Quincy R. R. Co.,
vs.
Mills County.

ASSIGNMENT OF ERRORS.

1. The judgment of the supreme court of Iowa is not authorized by the evidence.

2. Said judgment of said court is contrary to the Federal law and Federal authority.

3. Said supreme court erred in reversing the judgment of the district court.

4. All the assignments in the foregoing case are made also in this.

ARGUMENT.

THE LANDS IN SUIT ARE SWAMP LANDS.

By the act of Congress approved September 28, 1850, there was granted to the State of Iowa, to enable it to construct the necessary levees and drains to reclaim the same, the whole of swamp or overflowed land then unsold. This was a grant *in presenti*.

Allison vs. Halfacre, 11 Iowa, 450.

Keller vs. *Buckey*, 78 Ill., 133.

Railroad Company vs. *Smith*, 9 Wall., 95.

Montgomery County vs. *B. & M. R. Co.*, 38 Iowa, 208.

Railroad Company vs. *Brown*, 40 Iowa, 333.

Page County, vs. *B. & M. R. R. Co.*, 40 Iowa, 420.

2. By the act of Congress approved March 3, 1857 the selection of swamp lands then made and reported to the commissioners of the general land office, were confirmed to the State of Iowa, as belonging to the swamp land grant.

This act is as follows, to-wit :

"Be it enacted, &c. That the selection of swamp and overflowed lands granted to the several states by the act of Congress approved September 28, 1850, entitled an act to enable the State of Arkansas and other States to reclaim the swamp lands within their limits." And the act of the 2d of March, 1849, entitled "An act to aid the State of Louisiana in draining the swamp lands therein' heretofore made and reported to the commissioner of the general land office, so far as the same shall remain vacant and unappropriated and not interfered with by an actual settlement under an existing law of the United States, be and the same are hereby confirmed and shall be approved and patented to the said several States, in conformity with the provisions of the act aforesaid as soon as may be practicable after the passage of this law, * * "

Approved March 3, 1857.

See *Lester's Land Laws*, Vol 1 p. 285.

Fremont and Mills Counties vs. *R. R. Co.*, 22 Iowa, 91.

Railroad Company vs. *Fremont County*, 9 Wall., 89.

Railroad Company vs. *Mills County*, Abstract 105—8.

3. On the trial below it was agreed (abstract 84) that the lands in controversy were selected as swamp lands in the list returned to the general land office in 1854, which list was filed in that office prior to the passage of the act of March 3, 1857.

Here we have three concurring and related facts, viz:

The original grant *in presenti*, the selection and report of the lands to the commissioner of the general land office, and the confirmatory act of Congress, and these facts furnish the answer that the lands in suit are swamp lands.

Before offering any comments upon the instrument, which it is sought in this action to have pronounced invalid, (a copy of which instrument has already been presented to the court in the statement of the case, see pages v, vi and vii). the attention of the court is respectfully invited to some matters which constitute the *history* of the lands in controversy, including acts and memorials of the State legislature in regard to them; also to the history of the B. & M. R. R. Co., its being selected and made by the legislature of Iowa, the recipient or grantee of the lands, interest, rights, powers and privileges which were granted and conferred upon the State in pursuance of the act of Congress entitled "An act making grant of lands to the State

of Iowa, in alternate sections, to aid in the construction of railroads in said State," from Burlington on the Mississippi river to a point on the Missouri, near the mouth of Platt river, approved May 15, 1856, and its being thus the recipient of public bounty; its acceptance and consequent obligation to build its road on the line and route, via. Glenwood, and to Platsmouth as shown by its plat filed in the office of the Secretary of State of the State of Iowa, March 24, 1857. (See abstract p- 83).

The notorious character and condition of the lands which constituted the subject metter of the pretended contract at its date together with the knowledge thereof, which the B. & M. R. R. R. Co. had at the time.

The acts, doings and sayings of the B. & M. R. R. Co., through its officers and agents, which were calculated to and did excite the fears and alarm of the people and agents of the county of Mills that they would lose the road unless they gave them these lands, and which were done and uttered by the company and its agents for the purpose, as is claimed by plaintiff, of producing the result which they did produce, and showing that the company was at the time well aware that the offer of the instrument was made in direct and sole consequence of such unfounded fears and alarm, and finally the objects of the parties thereto in seeking and parting with a trust fund and property well known to each at the time to be such, and this, that the court may be enabled the more readily to understand the kind of artifices employed by the railroad company for the purpose of deceiving the people and their agents, and so obtain a contract that was and is essentially unfair, fraudulent and *ultra vires*. As in the contemplation and construction of a contract, reference must be had to the intention of the parties as ascertained from their situation and the whole scope of the contract,

courts in the construction and enforcement of contracts, look to the subject matter and the surrounding circumstances, as well as to the language employed, and may avail themselves of the same light which the parties enjoyed when the contract was executed. They are accordingly entitled to place themselves in the same situation as the parties who made the contract, in order that they may view the circumstances as those parties viewed them, and so judge of the powers and meaning of the parties, as well as the correct application of the language made use of. The motive which led to the making of the instrument and the object in contemplation at the time—especially if known to and participated in by both parties—are the most certain clues to lead us the discovery of its true meaning and character.

SWAMP LAND STATUTES.

The plaintiff's claim to the lands in controversy, is as trustee, to execute a trust conferred upon her, by acts of Congress and of the State legislature, and begins with the act of Congress dated the 28th day of September, 1850, entitled "An act to enable the State of Arkansas and other States to reclaim the swamp lands within their limits," offered in evidence by plaintiff, (see abstract, 80), and which will be found on page 519 of the 9th volume United States statues at large, edited by Geo. Minot, and published by Little & Brown, of Boston, and provides: "That to enable the State of Iowa to construct the necessary levees and drains to reclaim the swamp and overflowed lands therein, the whole of those swamp and overflowed lands, made unfit thereby for cultivation, which shall remain unsold at the passage of this act, shall be, and same are hereby granted to said State."

And after providing for the making out of an accurate list and

plats of those lands (§ 2,) enacting that the fee simple to said lands shall vest in the State of Iowa *subject to the disposal of the legislature thereof: provided, however,* that the proceeds of said lands, whether from sale or direct appropriation in kind, shall be applied exclusively, as far as necessary to the purpose of reclaiming said lands, by means of the levees and drains aforesaid.

This act antedates that under which the defendants did formerly claim these lands (May 15, 1856,) by about 5½ years.

This act of Congress has been held by the Supreme Court of Iowa to have "operated *ex proprio vigore* to pass the title at once," remarking that "the subsequent selection and patenting is required for the purpose of fixing their location and description" only.

Allison vs Halfacre, 11 Iowa, 451-2.

Page County vs the B. & M. R. R. R. Co., 40 Iowa, 521-2 opinion of Court and authorities cited.

Upon this basis and supposition, the State of Iowa have acted in all their legislation upon the subject.

By an act entitled "an act in relation to the swamp lands within the State of Iowa," offered in evidence (abstract, 80,) and passed as early as February, 1851, which is to be found in the revision of 1860, on page 147 and 148, they provided for the examination, survey and listing of the lands, and the procuring from the Surveyor General's office a list of the lands returned to that office as swamp lands.

Again, by an act passed January 13, 1853, offered in evidence, (see abstract, 80,) and to be found on page 148 of the Revision of 1860, they provided § 925, "that all swamp and overflowed lands granted to the State of Iowa by the act of Congress (September 28, 1850,) be, and the same are hereby granted to the counties respectively in which the same may lie, or be situated, for the purpose of constructing the necessary levees and drains to reclaim the the same; and the balance of said lands, if any there be, after the same are reclaimed as aforesaid, shall be applied to the building of

roads and bridges, when necessary, through or across said lands, and if not needed for this purpose, to be expended in building roads and bridges within the county."

The attention of the Court is respectfully invited to the construction here given to the original grant, and the evident purpose of that early legislature of 1853, in the execution of the trust, to apply the trust property as nearly as possible to objects of the donor, *the balance* only, if any, to be applied to the building of roads and bridges (not railroads) when necessary, (not *anywhere*) but *through* or *across said lands*, and if not needed for *this* purpose, *then* to be otherwise expended.

In § 925, same act, they provided for the appointment of "a competent person to proceed to examine said lands, and make due report, and plats, upon which the topography of the country shall be carefully noted * * to the county Courts respectively, which Courts shall transmit to the proper officers, lists of all swamp lands in each of the counties, in order to procure the proper recognition of the same on the part of the United States."

Again, by an act supplemental to this one, passed January 24, 1853, found in Revision of 1860, § 951, they provide "that so soon as the examination and survey of the swamp and overflowed lands in any of the counties of the State shall be completed, a full and complete return of the same shall be forwarded to the Secretary of State, whose duty it shall be to report the same to the Surveyor General."

Again, by an act passed January 25, 1855, entitled "an act * * * and for the purpose of selecting the swamp lands and securing the title to the same," and found in the Revision of 1860, §955, the General Assembly provided "that the Governor is hereby authorized to adopt such measures, as to him may seem expedient, to provide for the selection of the swamp lands of this State, and to secure to the State the title to the same, and also for the selection in the name of the State of other lands in lieu of such swamp lands as may have been or may hereafter be entered with

warrants. *Provided*, that the provisions of this act shall not be construed to apply to any swamp lands which have already been selected by any organized county of this State under the provisions of any previous law. *And provided further*, that this act shall not be construed to impair the rights of the counties of this State to any swamp lands within said counties under the provisions of any law in force in relation to the same, and *that the selections made by the organized counties shall be reported* by the Governor to the authorities at Washington."

And again: In these acts provisions are made in sectiohs 929, 930, 931, 932, 933, 934, 935, 940, 941 and 943, Revision of 1860, for the sale of these swamp lands to purchasers, and in § 946 and also §§ 973, 974 and 975 same, (an act passed January 25, 1855,) provisions are made for pre-emptions on the same.

All these acts of the General Assembly of Iowa antedate the act of May 15, 1856, under which defendants did formally claim tittle.

How many and what lands were thus disposed of by the counties to actual settlers will hereafter be adverted to, the object now being merely to give an historical sketch of the matter.

I now invite the attention of the Court to a brief description of the

BURLINGTON & MISSOURI RIVER RAILROAD COMPANY.

The Burlington & Missouri River Railroad Company was organized by original articles of incorporation dated January 15, 1852, and filed in the office of the Secretary of State January 23, 1852.

Its object is defined in article 10, which reads as follows: "The object of this incorporation is to construct and use a railroad extending from Burlington to the most eligible *point* on the Missouri River, and along the most eligible route." (See plaintiff's abstract, p. 82.)

The act of Congress making a grant of lands to the State of Iowa in alternate sections to aid in the construction of certain rail-

roads in said State, (offered in evidence, see plaintiff's abstract, p. 80,) and which will be found in the volume containing session laws passed at the extra session of the Fifth General Assembly of the State of Iowa, on pages VIII, IX, and X, provides, among other things, "that there be and is hereby granted to the State of Iowa for the purpose of aiding in the construction of a railroad from Burlington, on the Mississippi River, *to a point* on the Missouri River, near the mouth of Platte River, * * every alternate section of land designated by odd numbers for six sections in width on each side of said road. But in case it shall appear that the United States have, when the *line* or *route* of said road is *definitely fixed*, sold any sections or any parts thereof, granted as aforesaid, or the right of pre-emption has attached to the same, then it shall be lawful for any agent or agents to be appointed by the Governor of said State to select, subject to the approval of the Secretary of the Interior, from the lands of the United States nearest to the tiers of sections above specified, so much land in alternate sections or parts of sections, as shall be equal to such lands, as the United States have sold or otherwise appropriated, or to which the rights of pre-emption have attached as aforesaid; which lands (thus selected in lieu of those sold, and to which pre-emption rights have attached as aforesaid, together with the sections and parts of sections by odd numbers as aforesaid, and appropriated as aforesaid,) shall be held by the State of Iowa, for the use and purpose aforesaid. *Provided*, that the land to be so located shall in no case be further than fifteen miles from the line of said road, and selected for and on account of said road. *Provided further*, that the lands hereby granted for and on account of said road shall be exclusively applied in the construction of the same, and shall be disposed of *only as the work progresses*, and the same shall be applied to no other purpose whatever. And provided further, that any and all lands heretofore reserved to the United States by the act of Congress, or in any other manner by competent authority, for the purpose of aiding in any other objects of internal improvements, or for any other purpose whatsoever, *be and the same are hereby reserved from* the operations

of this act, except so far as it may be found necessary to locate the route of said railroad through such reserved lands." * *

(SEC. 3.) That the said lands hereby granted to the State shall be subject to the disposal of the Legislature thereof for the purpose aforesaid, and no other." * * as follows, to-wit:

(SEC. 4.) "That is to say, that a quantity of land not exceeding one hundred and twenty sections, and included within a continuous length of twenty miles of said road *may be sold*, and when the Governor of said State shall certify to the Secretary of the Interior that any twenty continuous miles of said road is completed, *then* another quantity of land hereby granted *not* to exceed one hundred and twenty sections for each twenty miles of said road completed as aforesaid, and included within a continuous length of twenty miles of said road, may *be sold*; and so from time to time until said road is completed; and if said road is not completed *within ten years* no further sale shall be made, and *the lands unsold shall revert to the United States.*

By proclamation of the Governor of the State of Iowa, under date of 3d day of June, 1856, see page 11 same volume, the General Assembly was convened in special session, and passed an act, approved July 14, 1856, offered in evidence, (see plaintiff's abstract, page 81,) and to be found in same volume above cited. Chapter 1, entitled "An Act to accept the grant, and carry into execution the trust conferred upon the State of Iowa by the act of Congress above referred to," and providing and enacting "that (§ 2,) so much of the lands, interest, rights, powers and privileges as are or may be granted and conferred in pursuance of the act of Congress aforesaid, to aid in the construction of a railroad from Burlington on the Mississippi river *to a point on* the Missouri, near the mouth of Platte river, are hereby disposed of, granted and conferred upon the Burlington & Missouri River Railroad Company, a body corporate, created and existing under the laws of the State of Iowa."

(SEC. 6.) The line and route of the road above described shall be definitely fixed and located on or before the first day of April next, after the passage of this act, and maps or plats showing such line

and route shall be filed in the office of the Governor of the State of Iowa, and also in the office of the Secretary of State of the State of Iowa. It shall be the duty of the Governor after affixing his official signature, to file such map in the department having the control of the public lands at Washington; *such location being considered final only so far as to fix the limit and boundary within which lands may be selected.*

Mark these italicised words. They are disposed of by a letter from the Interior Department, and by the certificate of the company which accompanies their plat (abstract, pp. 83 and 116).

(SEC. 8.) The grant aforesaid is made to said company, upon the express condition, that in case such railroad company shall fail to have completed and equipped seventy-five miles of its road within three years from the first day of December next, thirty miles in addition each year thereafter, for five years, and the remainder of their whole line of road in one year thereafter, or on the first day of December, 1865, then, and in that case, it shall be competent for the State of Iowa to resume all rights upon it conferred by this act, and to resume all rights to the lands hereby granted, and remaining undisposed of by the company.

(SEC. 13.) The said company shall assent to, and accept, the provisions of this act, by a written instrument under the seal of such corporation, with the signatures of the proper officers within ninety days after the passage of this act, which said acceptance shall be filed, in the office of the Secretary of State, and be by the Secretary recorded in a book by him kept for the recording of articles of association."

(SEC. 14.) Said railroad company, accepting the provisions of this act, shall at all times be subject to such rules and regulations as may from time to time be enacted and provided for by the General Assembly of Iowa, not inconsistent with the provisions of this act *and the act of Congress* making the grant."

At the same session of the Legislature, and just two days prior to the passage of the act last above quoted, by a memorial and

joint resolution in relation to the *swamp lands*, addressed to the Senate and House of Representatives of the United States in Congress assembled, the General Assembly of Iowa, after reciting that under the act of Congress of September 28, 1850, (that above quoted), a considerable amount of such lands accrued to the State of Iowa; that by an act of the General Assembly of the State of Iowa passed in January, 1853, (quoted above) those lands were granted to the counties respectively in which they were situated, in trust for the purpose of draining and reclaiming the same, and provisions were made for the selection, survey and disposal of the same; that under the last named act the greater part of the organized counties of the State containing swamp lands proceeded to select and survey the same; that much of the land so selected has been returned, according to the provisions of law and the instruction of the proper department, to the land offices of the several districts in which it was situated, marked upon the plats as swamp land, and withheld from sale or entry, and plats of land so withheld furnished to the several counties in which it was situated; that subsequently, to-wit, on the 25th day of January, 1855, an act of the General Assembly of this State was approved, (quoted above, and there referred to as §§ 973, 4 and 5 of the Revision of 1860,) by which, among other things, pre-emption rights were granted to actual settlers upon the swamp or overflowed lands where the same had been selected and returns thereof made to the county judges of the several counties, and at the same session of the General Assembly, an act was passed authorizing the Governor of the State to cause the swamp lands in the unorganized counties of the State to be selected, (quoted and referred to above as § 955 of the Revision of 1860); that under the provisions of these acts, a large quantity of those lands has been sold to or pre-empted by actual settlers, and especially since the passage of the law granting pre-emption rights, the withdrawal of the same from sale or entry at the land offices, and the furnishing of the several County Judges with plats thereof, having been considered by the people settling upon the same, and by the counties as a sufficient guaranty of title

in the State and through the State to the counties in which they are situated; that in many of the counties the funds arising from the sale of the swamp lands have been appropriated, according to the intent of the act of Congress, to reclaiming the same, and contracts have been entered into for ditching and draining and other matters—urged the passage of an act confirming the grant to the State of Iowa of all the lands that had been so selected and reserved from sale or entry."

This memorial will be found at length on pages 104, 105, 106, 107 and 108 of the session laws of the special session, at which the above quoted grant to the B. & M. R. R. R. Co. was made by the General Assembly of Iowa and passed and was approved on the 12th day of July, and just two days prior to said railroad grant. This is conclusive that the General Assembly did not intend to pass to the railroad company, these swamp lands, and the railroad company had this ample opportunity of knowing the intention. These acts are statutes on the same subjects, passed at the same session, and afford proof of contemporaneous legislative construction intended to be given to the act for the grant to the railroad company.

This act—the State grant to the railroad company—is dated July 14, 1856. In thirty-six days after its passage, so glaringly at variance with the act of Congress, was the provision above italicised—"*such location being considered final only so far as to fix the limit and boundary within which lands may be selected*"—that the Interior Department deemed it advisable to express its unequivocal dissent from such a construction being given to the act of Congress, and the then Commissioner of the General Land Office forwarded the following letter to the State Department of Iowa, found in plaintiff's evidence, see abstract, 116.

GENERAL LAND OFFICE, August 20, 1856.

GEORGE W. MCCLEARY, Secretary of the State of Iowa, at Iowa City:

Sir:—I have the honor to acknowledge the receipt of your com-

munication of the 12th inst., enclosing a certified copy of the act of the State Legislature, approved on the 14th of July, 1856, to accept the grant and to carry into execution the trust conferred upon the State of Iowa by the act of Congress making the grant of lands for railroads, approved May 15, 1856, which has been placed on the regular files in this office. It is observed that the sixth section of the law directs that it shall be the duty of the Governor, after fixing his official signature, to file such map in the department having control of the public lands in Washington, *such location being considered final only so far as to fix the limit and boundary within which lands may be selected.* The part which I have italicised appears to me to conflict directly with the act of Congress which contemplated that the route shall be "*definitely fixed,*" and it is proper that I should, through you, in this early stage of the business, call the attention of the State executive and the *companies* to the matter, and announce the opinion of this office so far as to prevent unnecessary delay. A route merely for fixing the limits of the grant will not be acted upon. It must be something real and fixed; the grant cannot be in one place and the actual route in another. Although slight variations of the line, such as are unavoidable in the progress of construction of such works, would be admissible, any material change of the route would be considered acting in bad faith with the United States, and cannot be tolerated, for such would be a clear violation of the law, which proposes an indemnity to the United States for the lands granted away by the enhanced value of the alternate sections remaining to the Government near the route of the road. The route of the road must therefore be definitely fixed, as required by the law of Congress, *or no title vests.*

In the above view it is expected that the certificate of the Governor, on the maps returned to this department, will set forth that such maps delineate the routes as "definitely fixed," that is as final locations, before they can receive our action.

I am, very respectfully, your obedient servant,

JAS. S. WILSON, *Acting Commissioner.*"

With full knowledge of these positions on the part of the State in regard to the swamp lands and of the Interior Department in regard to the location of their line and route, the B. & M. R. R. R. Co. did in writing accept as follows, to-wit:

"OFFICE BURLINGTON & MISSOURI RIVER RAILROAD COMPANY,
BURLINGTON, IOWA, September 3, 1856.

At a regular meeting of the Board of Directors of said company, held this day, the following resolution was unanimously adopted:

Resolved, That the act of the General Assembly of the State of Iowa, approved July 14, 1856, entitled an act to accept the grant and carry into execution the trust conferred upon the State of Iowa by an act of Congress entitled "An Act to accept the grant and carry into execution the trust conferred upon the State of Iowa by an act of Congress entitled 'An Act making a grant of lands to the State of Iowa in alternate sections, to aid in the construction of railroads in said State,'" approved May 15, 1856, be and the same is hereby accepted by this company, and all provisions of the same are hereby assented to.

W. F. COOLBAUGH, *President.*

Attest: OLIVER COCK, *Secretary.*

With the seal of the company hereto affixed, September 3, 1856.

Filed September 6, 1856,

G. W. MCCLEARY, *Secretary of State.*"

(See plaintiff's abstract, 82).

The next thing in order in point of time is the act of Congress of March 3, 1857, in response to the memorial of the Iowa Legislature, confirming the swamp land selections. This act perfected the right of the State to all lands that had at the date of its passage been selected and returned to the General Land Office, and which was filed in that office prior to the passage thereof. That act is as follows, to-wit:

"*Be it enacted*, &c., That the selection of swamp and overflowed lands granted to the several States by the act of Congress, ap-

proved September 28, 1850, entitled * * and an act of the second of March, 1849, entitled * * heretofore made and reported to the Commissioner of the General Land Office, so far as the same shall remain vacant and unappropriated and not interfered with by an actual settlement under any existing law of the United States, be and the same are *hereby confirmed*, and shall be approved and patented to the said several States, in conformity with the provisions of the act aforesaid, as soon as may be practicable after the passage of this law, *provided, however*, that nothing in this act contained shall interfere with the provisions of the act of Congress entitled "An Act for the relief of purchasers and locators of swamp and overflowed lands," approved March 2, 1855, which shall be and is hereby continued in force and extended to all entries and locations of lands claimed as swamp lands made since its passage.

Approved March 3, 1857."

It is admitted and argreed in this case (see abstract, 84,) "that the lands in controversy were selected as swamp lands in the list returned to the General Land Office in 1854, and which was filed in that office prior to the act of Congress approved March 3, 1857, with a few exceptional tracts."

The next thing to which the attention of the Court is invited is the filing of the plat and map of location and certificates thereto, which was read in evidence and is found (on page 83, plaintiff's abstract), as follows, to-wit:

"OFFICE OF THE B. & M. R. R. R. Co.,
BURLINGTON, IOWA, March 24, 1857.

It is hereby certified that in pursuance of the act of the Legislative Assembly of the State of Iowa, approved July 14, 1856, entitled "An Act to accept of and carry into effect the trust conferred upon the State of Iowa by an act of Congress entitled 'An Act making a grant of lands to the State of Iowa in alternate sections, to aid in the construction of certain railroads in said State, approved May 15, 1856,'" this map shows the *location* and *route* of the B. & M. R. R. R. from Burlington, on the Mississippi river,

to *a point* on the Missouri river, near the mouth of Platte river, in the State of Iowa, as *definitely fixed* in compliance with the said act of the Legislative Assembly of the State of Iowa, *and the said act of Congress*, and in pursuance of the orders of directors of the B. & M. R. R. R. Co.; that said map truly represents the precise times when said sections or part of the determinative line of said road was fixed on the face of the earth by the usual and proper making of the same, and by the execution of the field work thereof; that so much of said work as was executed prior to the 15th day of May, 1856, is included between the points designated on said map by station flags marked number 1 and number 2, and that the remainder was marked and executed on the respective days indicated along the line between the points designated by flags from No. 2 to No. 62 inclusive; that the several dates and points so marked were taken from the engineer's original field notes, of survey and location of said line, and that the marking of the line and field work above referred to was executed by and under the direction of the chief engineer of said railroad in accordance with the orders of The Board of Directors of said Company.

In testimony whereof the said B. & M. R. R. R. Co. has hereunto attached its corporate seal and caused the same to be signed by the President and Chief Engineer at Burlington, this 24th day of March, 1857.

W. F. COOLBAUGH,
President B. & M. R. R. R. Co.

H. S. THIELSON,
Chief Engineer B. & M. R. R. R.

Attest: OLIVER COCH, *Secretary B. & M. R. R. R.*

Filed in the office of the Secretary of State, March 27, 1857.

ELIJAH SELLS, *Secretary of State.*

The Court will please note that the terminus of the line or route of the railroad as shown by this plat, on page 83, at the Missouri river, is in the tier of sections running east and west, which is south

of the center line of township 72, and is therefore more than three miles south of the north boundary line of that township. The Court will please note, also, that the location of Plattsmouth is proven by this plat. Its location is important, as it is spoken of by witnesses in the case.

Next in point of time is the issuance, in defiance of this confirmatory act, of certificates by the Interior Department embracing the lands in controversy, in the years 1862 and 1863, as granted to the State of Iowa by the railroad land grant act dated May 15, 1856, and above quoted, as being the lands falling within the limits of said grant and the selections made in pursuance thereof. What are supposed to be copies of these certificates and the lists of the lands they embraced, and of the certificates of the Governor of the State of Iowa, attached thereto, will be found on pages 90 to 104 inclusive, of plaintiff's abstract.

The Court will please note that in each of these certificates is the statement that the same is made in accordance with the requirements of the act of May 15, 1856, and "*subject to all its conditions* and to any *valid interfering rights* which may exist to any of the tracts embraced in the foregoing list," and that the Interior Department approved the same, subject to the conditions and rights above mentioned. And second, that the certificates are *to the State of Iowa*, and not to the B. & M. R. R. R. Co. And third, that the Governor certifies merely that the *papers* attached are "true copies of the originals transmitted to me, and by me deposited for safe keeping in the office of the Register of the State Land Office of the State of Iowa." These certificates appear in plaintiff's abstract merely as exhibits to and a part of the answer of the B. & M. R. R. R. Co. in an action which was instituted by Mills County, Iowa, vs the said B. & M. R. R. R. Co., in the District Court of Mills county, Iowa, in the latter part of the year 1863, for the *purpose* of testing their validity, and in which their invalidity was and is an established and adjudicated fact, as is distinctly averred by plaintiff in her petition, see section 3 thereof, on page 5, of plaintiff's abstract.

Reference is now made to these certificates and to the issues in that suit and the decree and subsequent proceedings thereon for the purpose merely of placing the same before the Court as matters of history, and to show how the parties were affected by their knowledge of the matters in controversy, as by a notice. Plaintiff claims that all matters that were put in issue in that former action, and were by it decided by the Court, are, and in this action must be treated as, *res adjudicata*, and that they cannot be retried in this action. With this object and this only, the attention of the Court is respectfully invited to the object, the issues, and the decrees—original and in affirmance thereof.

The next thing then in point of time was the institution of said suit. It was brought as the record thereof will show, to settle the right and title in fee simple to said lands, praying that the right and title thereto be decreed to be in the plaintiff's therein, and that all claims thereto by or through the defendants be declared void, and held for naught, and for other relief. The petition averring that by virtue of the act of Congress of September 28, 1850, (the swamp land grant above quoted by me,) and by virtue of the act of the General Assembly of the State of Iowa, (the grant to the counties above quoted,) passed January 13, 1853, and acts supplementary thereto, and by virtue of an act of Congress entitled "An Act to confirm to the several States the swamp and overflowed lands selected under the act of September 28, 1850 * * " approved March 3, 1857. The petitioner became the owner of the lands embraced in the exhibits thereto, and averring that said lands were duly and legally selected and returned as swamp and overflowed lands under said acts; and that by virtue of said several acts she became the owner of the same, and entitled thereto in fee simple, and to the full, free and uninterrupted possession, use and enjoyment of the same; and that relying in good faith upon her right thereto by virtue of said acts, she had made divers contracts of sale to various individuals, but that she has not conveyed the same but retains and still holds the right to said lands vested in her by the acts aforesaid. (Plaintiff's abstract, pp. 85, 86 and 87.)

To this petition the defendant filed an answer denying all averments of plaintiff's petition, except that defendant claimed to own the lands in controversy, and admitting that defendant claimed to own the same by virtue of the act of Congress of the 15th of May, 1856, in plaintiff's bill referred to, and certain acts of the Legislature of the State of Iowa, and averring that by virtue of the act of Congress dated May 15, 1856, (meaning the land grant act to the State of Iowa above quoted), there was granted to the State of Iowa—for the purpose of aiding (among other things) in the construction of their railroad to *a point* on the Missouri river near the mouth of Platte river—certain lands of the United States, and that the General Assembly of the State of Iowa, by an act to accept the grant and carry into execution the trust conferred upon her by the act of May 15, 1856, granted to the defendant so much and all of the lands, interests, rights, powers and privileges as were or might be granted or conferred by said act to aid in the construction of said rail road, in like trust, and to aid in the construction of said railroad, and avers that the lands in complainant's bill and exhibit described were and are a part of the lands so granted by said acts of Congress and Iowa Legislature to the State and to the defendant to aid in the construction of said railroad, and have been and are listed and set off and certified and approved to this defendant, on and under date of the respective exhibits hereto annexed by the proper authority of the United States, under and by virtue of said acts of Congress and legislative acts, as will more fully appear by certified copies of lists and certificates setting off the same hereto annexed as a part of this answer and respectively marked "A," "B," "C," and "D," * * which said lists and certificates confer legal title to said lands on this defendant, and by virtue of which defendant makes and claims title thereto." (These certificates and lists, A, B, C, and D, are those to which I have heretofore referred as on pages 90 to 104 of plaintiff's abstract.) "Wherefore this defendant denies the right of complainant to said lands and says that this defendant has the better legal and equitable title thereto, and further answering, defendant says that the railroad

and the line and route thereof was actually surveyed and marked out on the ground as the *permanent route* through said Mills county on and between the 9th and 15th days of October, 1856, by the route and line designated and laid down on the plat thereof, and of the adjacent lands hereto annexed and marked "exhibit —," (for a copy of which see plaintiff's abstract, p. 83,) to defendant's answer, and which said railroad line was on the 24th of March, 1857, *formally adopted* by said railroad company as the *permanent line* of said railroad *through Mills county*, and that said adoption, when so made, related back to the times of the said actual survey and marking of the different sections indicated by the flags on the line of said road, at certain times, naming them, and prays to be dismissed with judgment for costs." See plaintiff's abstract, pp. 87, 88, and 89.

Upon such bill and answer, the following was the decree rendered by the District Court of Mills county, Iowa:

"MILLS COUNTY, IOWA,
vs
The B. & M. R. R. R. Co.

Now at this time, this cause coming on to be heard, and the Court having heard and examined the allegations of the parties, the evidence submitted and the arguments of counsel, and being fully advised in the premises, find the facts stated in the petition and amended petition herein *to be true*, and that the plaintiff is entitled to the relief therein prayer for. It is therefore ordered, adjudged and decreed by the Court *that the title in fee simple* to the *lands described* in plaintiff's amended petition, to-wit: (For this list of lands see list marked *Exhibit* "*A*," and which is to be found on pages 12 and 13 of plaintiff's abstract, 23,325 87-100 acres), and every part and parcel thereof is legally vested in the plaintiff, Mills county, Iowa, and it is adjudged and decreed by the Court that the said plaintiff is the owner in fee simple of said lands, and is entitled to the uninterrupted control, use and enjoyment of the same, and it is further adjudged and decreed *that the claim* of the

defendant, to-wit: the B. &. M. R. R. R. Co., to said land and to each and every parcel thereof is *illegal, null and void*; and it is further adjudged that the defendant pay the costs of this suit, taxed at $47.15, and that execution issue therefor.

Read, approved and signed, April 17, 1866.

JAMES G. DAY, *Judge.*"

The next fact in point of time was the appeal taken from this judgment by the B. & M. R. R. R. Co., to the Supreme Court of Iowa, and

The next fact in point of time is the judgment of affirmance by the Supreme Court of Iowa, as follows, to-wit: (Plaintiff's abstract, 105.)

June Term, 1867, appeal from Mills county.

"At the argument term held at Davenport, in April last, the Court ordered that this cause be affirmed, and filed their written opinion. It is now considered by the Court that the judgment of the Court below be and the same is hereby *affirmed;* that a writ of *procedendo* issue accordingly, and that the appellee have and recover of and from the appellant the costs in this behalf, laid out and expended at this Court, taxed at $19.30, and that execution issue therefor."

The opinion of the Supreme Court is found in 22d Iowa, pages 91 to 130.

The style of the cause in the opinion is:

FREMONT AND MILLS COUNTIES
vs
The B. & M. R. R. R. Co.

There being a case in Fremont county by and between Fremont County, plaintiff, and the same defendant, involving the same identical issues and questions. The two cases were argued, and treated, and decided, together.

The careful attention of the Court is now invited to a perusal of

that able and exhaustive opinion, which is in evidence, see abstract, p. 107.

The next fact in point of time, is the pendency of each of those causes in the Supreme Court of the United States on *writs* of *error*, being each docketed there on the 7th of December, 1867. For docket entries in the Supreme Court of the United States in each case, see plaintiff's abstract, page 106.

There are other facts in proof in the case to which the attention of the Court will be hereafter invited, but before adducing them the attention of the Court is respectfully directed to what are deemed to have been the necessary consequences, so far as the prior judgments are concerned, of a failure, on the part of the plaintiff in error, to prosecute its writ of error, in the Supreme Court of the United States, to a final order. Upon this point it is submitted:

That the modes of exercising the appellate jurisdiction of the Supreme Court of the United States are *appeal* and *writ of error*.

The distinction between the two is that appeal removes a cause entirely, subjecting the fact as well as the law, to review and reversal, but a writ of error removes nothing for re-examination but the law.

1*st Abbott's U. S. Prac.*, pp. 337 and 338, and authorities cited.

The Supreme Court of the United States had power, then, only to determine such errors of law as may have occurred at the trial or in the decision of the cause, and had no other authority than that of reversing, modifying or affirming the judgment of the inferior court, and of remitting the case back to the tribunal whence it came, that such tribunal might conform its judgment and decree to the view of its superior court.

2*d Abbott's U. S. Prac.*, pages 213, 214, 268, and 270.

It was only in case of *reversal* that the Supreme Court could, *at its discretion*, proceed to a final decision of the same and award an execution.

1*st Abbott's U. S. Prac.*, page 95, § 2.

The judgment thus appealed from in the Courts of Iowa, does

not until vacated or reversed, cease to operate, and was and remained until annulled or reversed binding upon the parties as to every question decided.

Harris vs Hammond, 18 Howard, Prac. 123.
Burton vs Burton, 28 Ind., 342.
Nill vs Comparet, 16 Ind., 107.
Bank of America vs Wheeler, 28 Conn., 432.
Curtis vs Beardsley, 15 Conn., 522.
Case vs Case, Kirby, 284.
Sloun's Appeal from Probate, 1st Root, 154.

It was the business of the plaintiff in error to prosecute the suit to judgment in the Supreme Court and procure a reversal or modification, if they wished to be rid of the judgment appealed from, as anything short of this left the judgment unaffected. Having failed to do this, they have never yet ceased to be bound by the judgment of the Supreme Court of Iowa. By that judgment a *procedendo* had been awarded. The writ of error did not have the effect of a *supersedeas*, as it does not appear that a copy thereof was lodged in the Clerk's office within ten days after rendering the judgment complained of, as might have been done under § 23 of statutes affecting courts and procedure.

See also Kitchen 93 U. S. page

1*st Abbott's U. S. Prac.*, 95.

This was the status and condition of things in law, and in fact, when the writ of error was filed in the Supreme Court of the United States, and on the 13th day of July, 1868, the date of presenting the proposition—the validity of which is now under examination—and to-day the judgment of the District Court of Mills county, Iowa, stands as a valid and subsisting judgment between the parties thereto and their privies, just as though no appeal therefrom had ever been taken, and this is claimed without any reference to the subsequent submission of the case in the Supreme Court by D. Rover, attorney for plaintiff, and T. Ewing and A. J. Harvey, attorneys for defendant in error, upon briefs and arguments, and

the affirmance by the Supreme Court, see plaintiff's abstract, 106.

The attention of the Court is now again invited to the further consideration of other facts in proof in the case, which transpired prior to the date of submission of that proposition, and first, to the further consideration of proofs in regard to the original survey and facts, showing the

OBLIGATIONS OF THE COMPANY

to build its road on the fixed line and route.

This original survey was run centrally through Mills county, and struck Glenwood, which was the county seat. Testimony of W. G. Summers, plaintiff's abstract, 112.

The railroad company had originally established their road through Mills county via Glenwood. Testimony of A. J. Russell, plaintiff's abstract, 112.

See also plat of original survey, which shows this fact. Plaintiff's abstract, 83.

Again: The terminus of the original line at the Missouri river was in township 72, the center township of Mills county, and a little south of the center of that township, see plat—abstract, 83—and was *definitely fixed* there in compliance with not only the act of the General Assembly of the State of Iowa, but with the act of Congress (the land grant act of May 15, 1856), as is stated in the certificate accompanying plat; and as the "permanent route," and "as the permanent line of said railroad through Mills county," as is averred in the answer of the B. &. M. R. R. R. Co., defendant in the former action and quoted above. And the company had received public lands as a donation to build and complete their entire railroad along said line and route to such terminus, as is shown by their acceptance of the grant by the general government to the State and by the State to them, and by their agreement in this case, see plaintiff's abstract, page 84, "that they had received under those acts———acres of lands other than those now in controversy," but notwithstanding these facts and their duties and obliga-

tions arising therefrom, we find Mr. James F. Joy, the President of the company,

MAKING THREATS

and announcing that if the people of Mills county want the railroad through Mills county they had better go to work and settle that suit. See Bosbyshell's testimony where he says:

I asked him (Joy) whether he thought the road would go through Mills county, and he said "*he did not know*;" he said "they hated to run a road through the county when the people were fighting them."

I asked him what the probability was, he said "he did not know —they did not want to run a road where the people were fighting them—it was very hard to build a road when the people was fighting all the time."

"I said I don't know as we are fighting you any."

"Well," he said, "*this suit.*"

I says "why can't you fix up that suit?"

He said "he did not know, *they* were willing to fix it up; you folks, *if* you want that road through Mills county, ought to go to work and settle up that suit, have that settled (something to that effect,) you and the Fremont county people."

I says, "us and the Fremont county people could not go to work and settle it, because *they want the road as bad as we* do, and they would be independent, and we undertake to tell them we was going to settle it for the purpose of having the road through here, anything of that kind, they would say we won't settle it unless we will have a road through there. They would be *independent* of us."

He made the remark that "nobody at these times was *independent* of a *railroad.*"

"This was several years before they commenced work here, and it was before the St. Joe Road was built." See plaintiff's amended abstract, page 8. 210.

This conversation was on board of a steamboat, where James F. Joy and Bosbyshell, the witness, had accidentally met. The wit-

ness, Bosbyshell, has lived in Mills county since 1856. Was County Judge in 1857 and 1858. Joy was at date of conversation President of the Burlington & Missouri River Railroad Company. On returning home Judge Bosbyshell related this conversation with Joy to quite a number of people at Glenwood. Judge Bosbyshell was *one* of the committee who presented the instrument to Mr. Perkins on the 13th of July, 1868. (Plaintiff's abstract, 75 and 76.) Here we find Mr. Joy, the President of the Company, telling a prominent, old and influential citizen of Mills county, and of Glenwood, some two years before they began work in Mills county, that *he did not know whether the road would go through Mills county!* The act of Congress approved July 1st, 1864, and allowing them to make a change or modify the location of the uncompleted portion of this line, did not justify any such statements. That act allowed the B. & M. R. R. R. Co. to "so far change or modify the location of the uncompleted portion of its line, as shown by the map (see plaintiff's abstract, 83,) thereof, now on file in the General Land Office of the United States, *as to secure a better and more expeditious* route *to* (not for) the terminus of said line on the Missouri River." For this statute see the Laws of the United States passed at the 1st session 38th Congress, 1863–4, page 345. This act gave no permission to change the *terminus* on the Missouri River, but simply the route *to* the terminus.

Their location, then, to the terminus at Plattsmouth—and of course through Mills county, as they could in no other way get to Plattsmouth—was *fixed* and *determined*, and *permanently* so, as we have shown. Why should Mr. Joy, then, be making such statements, so well calculated to inflame and alarm the public mind? It is submitted that he himself did not allow it to remain long in doubt. He meant to be understood, for in the same conversation he refers to *this suit*. Mark *he* first mentions this suit. He first says the county *is fighting us*, and when Bosbyshell replies that he does not know how, he rejoins, "Well, *this suit*." He did then and there assign as a reason for not building the road through Mills county, the law suit, and then when Bosbyshell suggests and says

why can't you fix up that suit, he (Joy) says if you folks want that road through Mills county you ought to go to work and settle that suit.

Is it any longer in doubt as to which of the two parties first suggested the settlement of that suit *as a means* and a *necessary step* towards *securing* the road through Mills county?

On his return home Bosbyshell related this conversation to quite a number of people at Glenwood. We need no further proof of how the excitement and fear of losing the road *first started.* It *started* with this conversation, this suggestion and *threat* of *the President* of the road.

Mr. C. E. Perkins says, abstract, page 151:

"I remember nothing having been done by the company to bring about that proposition (referring to the proposition for a contract) but it is possible that I may be mistaken."

His remembering or even knowing anything about it is of no consequence, if it is true, as we have shown it to be by Bosbyshell from Joy.

This announcement by the President of the company, followed as it was by surveys, which had the effect of

"SCARE LINES,"

was still further calculated to alarm the citizens of Mills county and their agents, and there *were* surveys. Mr. Perkins says (abstract 151 and 153), "at the time said proposition was made the road was completed to a point somewhere between Osceola and Afton," and then speaks of "surveys made from that point to the Missouri River prior to the submission of that proposition." "Those made through Mills county," and "those made from Red Oak, or near that place, to Council Bluffs." But he says, page 153, "I can't tell what lines the company did run; can't tell between what points, either; can't give the time when they were run; the records are burnt up, and I don't know that they would show it, either."

But he had just said they were run before the submission of the proposition.

Bosbyshell says, abstract, 75: "Prior to this (his talk with Joy) the company had run a line from Red Oak to Nebraska City." We have seen that the object of the company, in its original article, was to build a railroad to *a point* on the Missouri; that the grant was to build it to *a point;* that the acceptance was to build it to *a point;* that its location, which was *definite, fixed and permanent,* (so said the company when fishing for the lands under the grant), was to Plattsmouth, and via Glenwood. We have seen, also, that the law permitting a change allowed a change of route *to* the terminus and not a change of terminus. Why, then, run the line from Red Oak to Council Bluffs? The testimony of Fay and Hanks explains why.

W. Fay, a resident of Pottawattamie county, Iowa, says:

"In the summer of 1868 surveying party No. 4, under Engineer Haven, surveyed a route through the township in which witness resided, under the direction of the Burlington & Missouri River Railroad Company, from Red Oak to Council Bluffs. This party camped in witness' door yard four or five weeks; think they left the work and went eastward in July; about the time of leaving, Engineer Haven told me that *we* would *not* get the road; that it would be built through Glenwood. When I told him the survey was a big expense to the company, he said it had cost $6,000, but that the *company* had made $100,000 out of Mills county. When I asked him how, he answered: They have withdrawn the swamp land suit, given us a free right of way, and depot grounds at Glenwood—that is, citizens of Glenwood would buy the right of way from farmers. The party left that day, and never returned to survey again. Prior to this, Haven told me of a conversation he had with a *Glenwood man*, in which the latter asked him if he could build a road from Red Oak to Council Bluffs, to which he (Haven) answered: "Yes, a quarter of a million cheaper than through Glenwood." Party No. 4 consisted of six or eight persons, and in-

cluded Noah Hanks. This party left my place and camped near Council Bluffs, on the Glenwood road, for a time, and then camped again in my yard. During this time the railroad company were not building any road west of Red Oak." (See abstract, 73.)

Noah Hanks (abstract, 73 and 74) says:

"Was member of party No. 2, sent out by the Burlington & Missouri River Railroad Company, under immediate charge of Theilson, Chief Engineer. Theilson told us early in the season, and before starting from Red Oak, that the Road was to be built through Glenwood. But he told us not to talk too much; that we were not to know anything about it; it was to be the final route, but were not to tell it. This talk was at Red Oak. There were three parties there at the time—Nos. 1, 3 and 4. I stayed with No. 2 until after the survey of the Glenwood route was made, and then, under Theilson's orders, went to Red Oak and joined No. 4, under Haven, running a trial line, and whilst running this line, Theilson, Chief Engineer, was with our party every once in a while. Haven and Theilson had their private talks together at Indian Creek, Mosquito Creek, and twice at Council Bluffs. After running the trial line from Red Oak to Council Bluffs, we ran back and located about half of it. At first our work was done with great care, but towards the last, Haven, the transit man, told us we need not be so particular, as the probability was the road would go through Glenwood."

The Court will take judicial notice of where Council Bluffs is, and of its distance from the center of township 72, and that it is in Pottawattamie county, and not in Mills county, and some 18 miles distant from the point on the map showing the fixed and permanent terminus of the B. & M. R. R. R.

Why, then, run a survey to Council Bluffs? The survey to Council Bluffs could not have been for the purpose of finding a more feasible route *to* the terminus at Plattsmouth for the line and route they were under obligations—as shown above—to build.

Mr. Perkins says, in his evidence, plaintiff's abstract, 153:

"From my experience in railroading I would say that the effect of running several divergent lines, upon the people along those lines, would be to stir up strife and emulation along those lines. I have heard of railroad companies running lines for other purposes than that of finding a line for their road."

He says, also, page 151:

"I am unable to say now whether the company had determined to go through Plattsmouth *before* this proposition was made or afterwards!"

But if this be true what of the certificate of location quoted above, on pages 17 and 18 of this argument, with the plat attached? and of their right to the lands under the land grant act? It has been held by this Court that prior to a compliance of the company with the conditions expressed in the land grant act, they did not and could not acquire title to the lands so granted.
The State of Iowa vs Kirkwood, 14 Iowa, 162.

These lines were run, and run where they could not be designed as mere examinations of the country to find a more feasible route *to* the terminus at Plattsmouth. That such acts, coupled with such threats, should have produced alarm and anxiety in the public mind was inevitable.

The evidence in the case shows that there was such feeling of alarm, as H. C. Watkins, defendant's witness, says on cross-examination (plaintiff's abstract, page 174,) in referring to the instrument under inquiry:

"I think the securing of a railroad through Mills county via Glenwood, was in our minds as citizens, and also expressed in the proposition itself; and that there was *solicitude* that the road should run through the county, and *fears* were *entertained*—whether general or not, I will not say—*that the road might not finally be built on that route. The reasons* which operated to produce this fear in

the minds of the people, as I reccollect them, *were: The road was not here*; it was not here, and running *surveying parties*, which I understood were in the employ of the company, *were looking up different routes across the country for the purpose of ascertaining where the road would be built.* I cannot safely say further what *aroused people's fears*, because I don't know."

RE-DIRECT.

"My recollection is that not long before the proposition was submitted and agreed to, there were surveying parties sent out by the railroad company, and different routes were run. One route, I remember, was down Burger hollow, and another up Mud Creek."

(This Mud Creek route is the same testified to by Fay. See Wing's testimony below, and on page 190 of abstract.)

J. H. Wing, another of defendant's witnesses (see abstract, 190,) is finally pressed to the admission that:

"*I think there was* some *alarm* here *felt in raference* to where the road would go, and I think it was talked about when the committee was appointed. And I think *the settling of that feeling of alarm* on the part of the people *had something to do with it.* I remember a survey was made during that summer from Red Oak to Council Bluffs."

RE-CROSS.

"I can't say that the survey of the Mud Creek route from Red Oak to Council Bluffs was not then in progress. It might have been and it might not."

This is the same survey testified to by Fay.

Fielding Utterback (abstract, 113 and 114,) says:

"I have lived in Mills county twenty years; was a member of the Board in 1868, and when the proposition for a contract was made. There was much said about where the road should run.

They did not know where it would go. They wanted to get it right through Glenwood. The *company was running two or three different routes*, as I understood it, *running routes one place and another, but the citizens wanted it through Glenwood.* At that time we were anxious to have the road come through the central portion of the county. I know *I* was. I did not know where it would go. *There was some doubt about it*, some way." * *

"At the time the proposition was made we had a suit in the United States Court. What influenced me in my action was this: Our land was held, and we could not have it settled. We wanted it to come in for taxes. *I did not care who owned it.* I thought it would be to our advantage to increase the taxes."

RE-DIRECT.

"I don't say that this (the settlement and taxing the land) was the whole inducement. The way I understood it, it was that the *citizens wanted the railroad through here, and in settling it there was all the while a proviso that this should be a point. This was one of the inducements.* I thought that the nearer the center of the county we got the road, the better it would be for the county. *This is what they all thought*, so far as I heard them express themselves."

Samuel Allis (abstract, 115,) says:

"I was a member of the Board in 1868, and at the time the committee was appointed. * * I remember different surveys being made, north and south, but you could not tell which of those routes they intended to run. I presume there was doubt at the time the committee was appointed as to where the road would run. I recollect some saying *if we did not use our influence the railroad company might run around us and leave Mills county in the cold.* There might have been *alarm* in the *public mind, and in the mind of the Board on that subject. I presume there was. Our object in sending the committee was to get the road centrally through the county.* The *people seemed unsettled* in their minds *and in doubt where the*

road would run, and they wanted an understanding in some way, and settlement made, and we appointed the committee to confer with the railroad company and make some arrangements."

CROSS-EXAMINATION.

"One of the principal reasons for making the proposition was *to prevent the loss of the lands.*"

But, how could the giving away of all the lands prevent their loss? Perhaps the witness meant that giving the lands for the railroad would be getting an equivalent for them, and thus no loss.

L. W. Tubbs, defendant's witness, (abstract, 186,) says:

"In respect to alarm being felt in the minds of the people, in regard to whether they would get the road centrally through Mills county or not, I will say that we were always uneasy about that, for we did not know where it would go, or anything about it. I didn't recollect anything more at that time than there had been for years previous. I refer to the first of June. *I know there was an uneasiness that fall—quite an uneasiness in regard to the road.*"

S. W. Williams, defendant's witness, (abstract, 187,) says:

"I was a member of the Board of Supervisors in 1868, at the time the committee was appointed to confer with the railroad company." * *

And on cross-examination, says:

"I knew nothing personally, at the time, of running the line from Red Oak to Council Bluffs—only by hearsay. I had heard of such a survey. *There was at that time some considerable uneasiness felt here with a good many that the road would not be built through Glenwood, and centrally through Mills county; and that was one of the inducements in making the proposition.* In my answers I have had reference to the feelings, views and fears of the Board, as I understood them."

RE-DIRECT.

"We wanted to make the best bargain we could. We were working for the county, *and if we could get the railroad through the county*, and get the titles to the swamp land settlers in the county, we thought we were doing a pretty good day's work."

A. J. Russell, plaintiff's witness, (abstract, 110,) says:

"I have resided in Mills county twenty years; am a merchant; was a member of the Board of Supervisors in 1868, when the proposition between the county and the Burlington & Missouri River Railroad Company was acted upon. *There was at that time some doubt and concern as to whether the railroad would be built centrally through Mills county via Glenwood, or not;* and this had, to a certain extent, an influence inducing the making of that proposition. There were other reasons with it. Can't tell what caused the feeling of alarm that existed at the time. It was generally the conversation. I don't know as there was any particular reason, *only* to have the road. There was talk of the road going to Council Bluffs and talk of its going to Nebraska City; it was not definitely settled where it would go. This feeling existed at the time the committee was appointed to go to Burlington. This feeling of *alarm existed* at that time. There was *doubt*, and this was to settle the thing permanently in regard to where the road was to go, and to settle the titles to the land, was my understanding of it, and the people were after us to get it fixed. This state of feeling existed from the time the committee was appointed until the proposition was accepted."

CROSS-EXAMINATION.

* * "*There was anxiety;* every one was feeling an interest in it. I could not say that this anxiety was not created by any act of the railroad company. I don't *know* of any act, any more than the *disposition of the people to believe that the railroad company did not intend to run the road here unless there was some act to induce it.*

I don't know of any specific act done by the railroad company. *There was a fear among the people that they might lose the road.* After the committee was appointed and authorized to submit this proposition, we, as members of the Board, felt relief from the constant importunities of the people who held these lands under the county, for some action to be taken to quiet the title to their lands. Of my own knowledge I know of no lines being run other than the original line of 1856. Had heard of such other lines being run at the time of the acceptance of this proposition, in November, 1868. From reports there had been several surveys."

RE-DIRECT.

"I knew at the time that the railroad company had originally established their road through Mills county via Glenwood. *The report that they were contemplating the construction of the road elsewhere, and the fear induced thereby that we would lose the road, had a great deal to do with bringing about this contract and arrangement.*"

RE-CROSS.

"There were these reports at that time—June, 1868,—but who brought them about is a question I can't answer. I don't know who started them or where they originated. These *reports* influenced my mind, whether the railroad company did it or not. This was in June, the same time the proposition was made, which was to make *sure of the road* for *one object*, and to quiet the title for the other."

W. G. Summers, plaintiff's witness, (see abstract, 112,) says:

"I have lived in Mills county nineteen years. Was a member of Board of Supervisors in 1868-9, and at the time the committee was sent to Burlington. The object of the committee was, if I understand the thing right, to get the railroad to this point—Glenwood—and to settle an old law suit. The original survey was made be-

fore I came here. This survey ran centrally through Mills county, and struck Glenwood. When I came to Mills county it was the understanding throughout the county that the road was to strike Glenwood, the county seat. This expectation continued until about the time that the proposition for a contract was gotten up. At the time the committee was appointed *there was considerable fear* in the *minds* of the *members of the Board, that the road would not be built centrally through the county, via Glenwood.* There was strong talk of the road running to Nebraska City, and some little talk of its running to Council Bluffs, but during our session of the Board of Supervisors Nebraska City was most talked of. Surveys had been talked of, both north and south. There was talk by a good many that either of these surveys were easier built than the original survey. I mean to say that *there was alarm existing*, and that *it was these surveys and other matters, which caused it to be a matter of doubt that the road would be built on the original line. This alarm and feeling was general* among the members of the Board. It was one of the topics of the day—with other things. *This inducement*, which the Board had in offering to devote these lands, in that proposition, *was* to *secure* the *railroad* centrally through Mills county. That was my idea. Had not the latter clause of that contract been thrown in I would not have voted for it. By the latter clause I mean that part providing for a railroad via Glenwood. If this had been left out I don't think they would have got the contract. It was a *leading* consideration in making the proposition, *to secure* the road."

While influenced by this feeling of alarm and excitement produced by this state of facts and circumstances, the Board of Supervisors appointed a committee by the passage of the following resolution, to-wit:

"On motion of Mr. Wing, Wm. Hale, E. C. Bosbyshell, L. W. Tubbs, D. H. Solomon and S. Christy were appointed a committee to confer and treat with the B. & M. R. R. R. Co. with a view to

settling the *points in controversy* between the said company and the county." See plaintiff's abstract, page 77.

This was done at the June session, 1868.

It was not, then, to settle *the lawsuit* that the committee was appointed, but to settle the *points*—more than one—in controversy. What those points were cannot be better arrived at than by an inspection of the instrument, hereafter introduced—abstract, 21, 22 and 23—which shows them to have been to settle a lawsuit and *secure* a railroad.

This committtee proceeded to Burlington, and on the 13th day of July offered the instrument under examination. As to what took place then Bosbyshell states that:

"When the committee started over it was a question of great doubt whether or not we would get the road through Mills county. There was excitement. Everybody was interested more or less to have the road. Mr. Perkins said to the committee at Burlington that the company would require the right of way through the county *if they ever ran the road there*, and that *he did not know if we could get it there*. He said something about the remission of taxes for two years; *said* he could not *guarantee what the company would do;* that he would submit our proposition to the directors and would let us know." (Abstract, 76.)

The committee was appointed June 2d, but did not start until July 11th. The proposition submitted was prepared at the Barrett House, in Burlington. After its submission, Perkins brought up the questions of right of way and taxes, but our authority did not go beyond the written proposition. There was really a great desire prevailing in the minds of all parties interested in that proposition to *secure* the *road*. We were all anxious to have it.

In his testimony (see plaintiff's abstract, 151, 152 and 153,) C. E. Perkins, among other things, says:

"In July, 1868, I was superintendent of the Burlington & Missouri River Railroad Company. The proposition by the county

was made to me, as resident agent of the company. At that time the road was completed to a point somewhere between Osceola and Afton. * * I suppose I did know at the time the proposition was made to me here in Burlington, that the object of the committee, and the object of the Board of Supervisors, in making this proposition, was to secure this line through Mills county and a depot at Glenwood, and that they were actuated in making this offer through a fear that if they did not make it we would go elsewhere, and that this was one of the inducements for making the offer."

In interpreting this instrument, the sense in which Mr. Perkins *knew* the county agents understood and intended it, is to prevail against the company.

The statute of Iowa at that time (Revision of 1860, § 3994,) reads as follows: "Where the terms of an agreement have been intended in a different sense by the parties to it, that sense is to prevail against either party in which he had reason to suppose the other understood it."

The company here is shown to have had a knowledge direct and positive of the fact that there was alarm, and that the trustees of the trust estate were actuated by a desire to procure an internal improvement, in which it is not a violent presumption to infer that they were personally interested. Mr. Perkins, the agent of the company, had ample means of knowing that the motives for making the contract were not altogether for the benefit of the trust estate.

This is the evidence of record in the case. These are the facts and circumstances prior to and which produced the instrument under consideration.

The petition alleges in substance, in regard to matters transpiring prior to and at date of proposition, as follows (plaintiff's abstract, 1 to 12 inclusive):

1st. That by act of Congress of May 15, 1856, the United States granted to the State of Iowa certain lands for the purpose of aiding the building of a railroad from Burlington, Iowa, to a point on the Missouri River, near the mouth of the Platte. § 2.

2d. That the State of Iowa accepted the grant with its trusts, and bestowed the land upon the Burlington & Missouri River Railroad Company—defendant in this case by act of Legislature. § 2.

3d. That the defendant—the Burlington & Missouri River Railroad Company—accepted the grant according to its terms and has received lands thereunder. § 3.

4th. That the particular tracts of land to which the railroad company was entitled could not be fixed upon until the permanent location of the line and route of said road was made, which is alleged to have been made through Mills county on the 24th day of March, 1857. § 2.

5th. That by the acceptance of the grant and the location of the road said railroad company became bound under the obligations of a contract, with the State of Iowa and especially with the people of Mills county, to build and construct its road on the line located through Mills county. § 2.

6th. That a conflict soon arose between the railroad company and the county, as to the ownership of about 23,000 acres of swamp land, which the county claimed under the "swamp land grant act" of Congress of September 28, 1850, and the railroad company under the act first above mentioned. § 3.

7th. That a petition in equity was filed by the county against the railroad company, to quiet title. § 3.

8th. That in that action the basis of defense of the railroad company was said land grant acts of Congress and the State Legislature, for railroad purposes. The location of their line permanently, as required by those acts and certificates, signed by the Commissioner of the General Land Office, certifying the lands in dispute as inuring to the State of Iowa for the use of the railroad company. § 3.

9th. And that in that action the plaintiff claimed to own the lands in controversy by virtue of the swamp land grant act of September 28, 1850, and an act of the State Legislature passed Janu-

ary 13, 1853, and other acts of said Legislature, selections duly made, and a confirmatory act of Congress passed March 3, 1857. § 3.

10th. That a decree was rendered in the District Court of Mills county, Iowa, finding the plaintiff therein to be the owner in fee simple of said lands, and entitled to the uninterrupted control and use and enjoyment of the same, and that all claims of the defendant—the B. & M. R. R. R. Co.—to the lands in controversy, based upon acts of Congress, and acts of Federal and State officers in pursuance of such acts, was duly adjudged to be and to have been null and void. § 3.

11th. That said judgment and decree, on appeal taken to the Supreme Court of Iowa by the defendants therein, was, at the June term thereof, 1867, affirmed, which judgment of affirmance of the Supreme Court of Iowa has never been reversed, modified, or changed. § 3.

12th. But that notwithstanding the said decision of the Supreme Court of Iowa, and pending an appeal to the Supreme Court of the United States, and just prior to the commencement of their work upon their roadbed in Mills county, the defendant—the B. & M. R. R. R. Co.—by means of *threats* and *scare lines* and other fraudulent devices and pretences resorted to for the purpose of creating a fear in the minds of the people of Mills county, threatened that notwithstanding its contract and obligation to build its road on the line and route thus permanently fixed by them unless other inducements were offered and given, it would abandon its said line and route through Mills county and go to other rival points above or below. That, influenced and alarmed by these fraudulent practices, the then Board of Supervisors did entertain a proposition for a contract affecting the lands in controversy, the legal effect of which is alleged in the petition, but which is here inserted in full as set out in an exhibit to the petition and is as follows, to-wit: § 4.

"In order to settle and finally adjust the lawsuit now pending in the Supreme Court of the United States, wherein Mills county, in the State of Iowa, is plaintiff, and the Burlington & Missouri River Railroad Company is defendant, and secure the completion of the said railroad through Mills county, via Glenwood, in said county, we, the authorized agents of said county, submit the following proposition to the Board of Directors of said Railroad Company, to-wit:

There are in dispute between the parties to the said lawsuit twenty-three thousand three hundred and sixteen acres.

For the purpose of having our proposition understood, we acknowledge that we owe you acres of land to the amount of 23,316.

To pay which we have and offer you odd sections vacant (most of which is a part of the 23,316 acres) and even sections patented to the county and unsold, in the aggregate 9,080. Balance of the land due you, 14,236 acres. For further payment we have and offer to you of the odd sections (about all of which is of the 23,316 acres claimed by you) subject to pre-emption made through the county, acres to the amount of (on which nothing has been paid to the county) 4,660.

Of these pre-empted lands we estimate that about one-half of the pre-emptions are fraudulent and ought not to be recognized, but the county must ask that where *bona fide* improvements have been made on the same, the pre-emptors must be secured in their rights to the same, and have the privilege of purchasing at $1.25 per acre of the county or company, which amount shall in any event go to the railroad company. Now you will have land for land, subject only to the pre-emptors' claims, until there will be due you in acres 9,576.

The remainder, 9,576 acres, belong to *bona fide* settlers and purchasers, who, we must insist, shall be protected by the county. And as we have paid you all the land we have, we offer you for this balance ten thousand dollars in money.

The company should understand that the balance of 9,576 acres is the land, portions of which it has been settling with our individual citizens for, and there is included in the 9,576 acres all the

lands the company has sold to citizen settlers at $1.25 per acre. With this understanding the $10,000 we offer you will be just as much less than 9,576 acres as the company has thus sold, and therefore our pay would perhaps amount to $1.50 or more.

It is understood that the suit now pending shall be continued by agreement of the parties from term to term until the conditions of this contract or proposition shall be complied with.

It is also further understood that the foregoing proposition shall not be binding on the county of Mills unless said railroad company shall complete said railroad through Mills county via Glenwood, and build a depot *at Glenwood*, in said county; and in case said railroad company shall fail or neglect to build said railroad through Mills county via Glenwood, and also to build and establish a depot at Glenwood, in that county, then and in that event the said lawsuit shall stand for final hearing in the Supreme Court of the United States, the same as if this proposition had never been made.

In case the suit shall be settled on the basis of this proposition, each party shall pay their own costs.

The manner of transferring the land, whether the county shall deal with the purchasers and pre-emptors or whether the railroad company, under the restrictions indicated, the county is not particular about, but will agree to what may seem most practicable.

The amount in acres, as stated above, may not be exactly correct, and probably is not, but it is believed to be nearly so, but we wish it understood that the company shall have all the swamp lands the county holds or is entitled to in Mills county, Iowa, subject only to the conditions indicated in the foregoing.

July 13, 1868."

13th. The petition further alleges that said proposition is void because the lands to which it referred had long since been vested in the county of Mills as swamp lands, and that it was a proposition and contract to devote swamp lands to the making of a railroad through Mills county. § 4.

14th. That the lands could not be so devoted without submis-

sion to popular vote, which was never done until June 19, 1871, and was then largely voted down. §§ 4 and 7.

15th. That the said supposed contract, however apparently amounting to a compromise of the suit then pending in the Supreme Court of the United States, was not a compromise of said suit; because the Board of Supervisors had not at the time, the power or legal authority to make such a compromise, involving as it did a diversion of a trust fund, claiming substantially that the act was not a benefit to the trust estate, but was nothing short of a useless abandonment and surrender of the whole of it to a stranger, and that, too, after a decree in chancery had been made and rendered, settling and quieting the title in them as against that stranger; that it was tainted with fraud, actual as well as constructive, with a desire on the part of the trustees to secure to themselves and strangers to the trust estate, personal profit and gain, and because it was a donation to said company and stranger to the trust estate upon the consideration that they would do that which they were already under contract to do, and that said contract was without consideration, (¶ 2, page 11); and that the same is for these reasons void, § 6; and on this issue thus tendered, prays that any and all claim of the railroad company, through any Congressional or Legislative act, or anything done in pursuance thereof may be declared, *res adjudicata*, in favor of plaintiff; that said contract may be declared to have been obtained by means of fraud and circumvention, to be inoperative, null and void; that it was without consideration, and *ultra vires*. Pages 11 and 12.

To this branch of plaintiff's petition the defendant, the B. & M. R. R. R. Co., does not answer, and therefore as to itself, admits the averments of the plaintiff. See plaintiff's abstract, 30 and 31.

But the C., B. & Q. R. R. Co. caused itself to be made a co-defendant, and filed an answer, and therein to this branch of plaintiff's petition, say substantially as follows, to-wit:

The answer to these averments by the C., B. & Q. R. R. is (see plaintiff's abstract, pp. 31 to 41):

1st. A denial of all not admitted or that is inconsistent with answer. § 1.

2d. Admits the pendency of suit in Supreme Court, and that the lands now in controversy with others were in controversy therein. §§ 6 and 7.

3d. That long prior to said suit Mills county had sold 9,000 acres of the lands embraced in that controversy. § 8.

4th. That the Board of Supervisors were in doubt as to result of that suit, and without the knowledge of the B. & M. R. R. R. Co. appointed a committee to submit the proposition for settlement of matters in controversy in the suit pending in the Supreme Court of the United States. § 9. Denied in reply except as to appointment of committee. § 6.

5th. That the committee proceeded to Burlington and on the 13th day of July, 1868, did submit to the proper agents of the B. & M. R. R. R. Co. the proposition for compromise therein, and that the Board made it then and there. §§ 10 and 12.

6th. That the same was entertained and afterwards—October 31, 1868,—accepted, and notice thereof given to the Board of Supervisors, and that after due consideration by them the same was confirmed by the said Board. §§ 13 and 14.

7th. Denies that the B. & M. were bound as by contract with the State of Iowa to build its line of road through Mills county, via Glenwood, and avers that the State of Iowa never had any contract with the B. & M. by which the latter agreed to build its road upon any special, particular line, nor did the State of Iowa ever require the road to be built upon any fixed or definite line, but did specially exempt them from building on any definitely fixed line or any other line. (§ 27.)

8th. That the B. & M. Co., claiming and believing that it owned, had in good faith sold many tracts to settlers, and had

bound itself for title on making payment of purchase money, and that Mills county had sold other tracts to other persons, and became likewise so bound. § 28.

9th. And that these purchasers were uneasy, the settlement of the county hindered, and for the purpose of putting an end to litigation, quieting fears, encouraging the settlement of the county and saving the parties delays, vexations and expenses of continued and harassing litigation, the plaintiff made to the company the proposition for a compromise, and it was accepted by the company as a compromise, and *only* as a compromise. § 28. (Denied plaintiff's reply where inconsistent with petition. § 17, abstract 62.)

10th. And deny that the county was induced to offer the proposition by fraud and misrepresentation and the running of scare lines through the county for the purpose of acting upon the fears of the people or influencing the Board. § 29. Denied, see plaintiff's reply. § 18, abstract 62.

Plaintiff, in reply, § 19, abstract 62, also makes general denial of all things contradictory to or inconsistent with petition and reaffirms petition.

Afterwards plaintiff filed an amendment to her petition, to be found on page 29 of plaintiff's abstract, as follows:

"§ 2. That there is, and for a long time has been needed funds with which to drain and reclaim swamp and overflowed lands in Mills county, Iowa, and that it will require all the funds that can be realized from the sale of all the lands in controversy to drain and reclaim the same, and make and establish the levees that are and will be nedeed for that purpose. Plaintiff reiterates all former statements and prayers herein made."

That this amendment was filed on the 7th day of February, 1876.

But that a motion was made on the 8th of February by the defendant, to strike out the matters contained therein, on the ground that the same were redundant and immaterial.

Which motion was sustained by the Court. See plaintiff's amended abstract, page 209.

Which ruling of the Court was duly excepted to at the time by plaintiff.

This debarred us of the benefit of this important averment and fact in the Court below.

ARGUMENT.

These are the facts which antedate and are contemporaneous with the presentation of the instrument. The railroad company had knowledge of each and every one of them, not excepting even the feeling of alarm which influenced the other party at the time.

And these are the issues in the case in regard to matters which transpired before and at the date of presentation of the proposition. It is proposed *now* to examine the proposition, *first*, with reference to all matters contemporaneous with and prior to its date, leaving out of view entirely for the present, all matters subsequent thereto, except, perhaps, the mere fact of acceptance and failure to accept and ratify, and as the instrument itself provides for some things, as conditions, that were to be done in the future, to ascertain what those things were—what effect the doing or not doing of them was to have and did have upon the instrument—and consider whether they were done in such mode and manner as to validate the instrument and give to it the necessary elements of a contract. First, then, what does it take to constitute a contract?

A contract is defined by Story, (5th edition,) § 1, to be "A deliberate engagement between competent parties, upon a legal consideration, to do, or to abstain from dioing, some act."

And the essentials of a simple contract have been given in Comyn on Contracts, p. 2, as:

1st. A person able to contract.
2d. A person able to be contracted with.
3d. A thing to be contracted for.
4th. A good and sufficient consideration.

5th. Clear and explicit words to express the contract.

6th. The assent of both contracting parties.

Tried by these touchstones, in view of the proofs in this case, how is it with this instrument?

Defendants aver that the proposition was made by the Board of Supervisors. Let it be so. Consider, as they claim it to be, that it was the Board of Supervisors who presented the proposition.

Judging from the instrument, the objects of the Board in making the proposition, apparently at least, were two—to settle a lawsuit and to secure a railroad. See lines 1 to 7 inclusive, of the copy as printed above on page 43.

The engagement, it is submitted, was not

DELIBERATE.

The agents of the county were compelled to submit to terms which the fraud and oppression of the other party and their necessities in consequence, imposed upon them.

Why were the Board of Supervisors of Mills county there in this trembling condition as suppliants in the presence of the B. & M. R. R. R. Co.? The proof in the case shows them to have been in that condition and attitude—that they were filled with alarm. By reference to the history of affairs for the two years just previous to this, it will be understood at a glance why. (*Supra*, 27 to 39.)

It had been more than whispered, that the giant wanted—and before it would fulfill its contract with the people of Mills county—demanded, the swamp lands of the county.

The county had gained, and of course the company had lost, these lands in their legal controversy in the highest court of the State.

The company wanted the lands which they had lost.

The agents and the Board wanted the road on the old line and route centrally through the county and via Glenwood.

The company, by threats and artifices of its officers and agents, had filled the minds of the Board with alarm and fear that unless

they gave the lands to the company as a further inducement they would not build their road on that line.

The property was trust property, and held by the county as trustee, subject to special, particular and active duties as such trustee, which had not yet been performed.

The Board were agents *merely* of the county, and of the county as trustee in regard to this property.

The property did not belong to the individual members of the Board or their agents—they had personally no interest in or concern about it. Pecuniarily it was a matter of total indifference to them, personally, who got the property.

The individual members of the Board and their agents, being residents and property holders of Mills county, and some of the agents citizens of Glenwood, it is but fair to presume were deeply interested personally and pecuniarily in securing the railroad.

The company then were about to treat with these members of the Board of Supervisors and their agents, with full knowledge of the fact that they were *mere* agents, and agents of a trustee, and that they were influenced (*Supra*, p. 40,) by these motives and fears.

These were the motives which actuated the parties to this treaty, and their situations respectively. This was the character and condition of the matters to be contracted for, as the proof shows.

And this condition of things had been brought about by the railroad company, through its officers and agents, by

FRAUD.

The bill states that the railroad company was bound as by a contract, to build its road on the old line. Were they so bound? Do the proofs show it? We think they do.

Lands were donated to the company by acts of Congress and State Legislation, (*Supra* 10, 11 and 12,) but they were in the nature of a float, and no title or estate, legal or equitable to any particular tracts of land, vested in the railroad company until its line was definitely and permanently fixed.

Fremont County vs B. & M. R. R. R. Co., 9 Wal., p. 94.

The petition alleges, and the proof shows (*Supra* 18) that the line of the defendant's road was located on the 24th and 27th of March 1857.

That act vested the property in, and right to, certain lands in the B. & M. R. R. R. Co., subject only to the limitations and conditions of those acts, and this right could not be taken away or lost but by a failure to comply with the conditions and limitations.

The company, having become so vested with such rights by such definite location and permanent fixing of its line, became at the same time obliged, as by the force of a contract, to build its road upon this line. Having accepted the grant and anchored its float, it could not build upon any other line.

It is true they now claim in the answer of the C., B. & Q. (*supra* p. 46, §7) that in their contract with the State they were not bound to build on any particular line. Whatever else may be said of this plea, it cannot be said that it is not *characteristic*. They refer, of course, to the italicised clause in the State grant to the B. & M. (*supra* p. 12), but notice of its repudiation and invalidity, as being at variance with the national grant, was officially given by the Interior Department (*supra* p. 15) and prior to the acceptance by the company (*supra* 16) and to its actual location (*supra* 18), by their certificate of location. In this certificate they say:

"This map shows the location and route of the B. & M. R. R. R. * * as *definitely fixed* in compliance with the act of the legislative assembly of the State of Iowa, *and the said act of Congress.*"

This plea is characteristic for this reason: In order to get the lands that did properly pass under the grant, this line was fixed and permanent, and so agreed to be, by them. But in order to secure the lands in controversy, which did not pass under the land grant act, as they could succeed in this better by claiming that the line and route was *not* fixed and permanent, they now claim that it was *not* fixed. That line was as uncertain as was the kind of ani-

mal the fellow had in his sack, which, on his drawing it out, would sometimes be pig, and sometimes it would be puppy.

But to return: The company, having become so vested with such rights by such definite location and permanent fixing of its line, became at the same time obliged, as by the force of a contract, to build its road upon this line. Having accepted its grant and anchored its float, it could not build upon any other line.

The act allowing them to change their route *to* the terminus, did not give them the right to change their *terminus*. The effect of that act as being no justification of such surveys as the company made, has been sufficiently discussed. (*Supra* 28.)

The bill avers fraud, and its averments are sufficient. It is not necessary in a bill to charge minutely the circumstances which may conduce to prove the general charges. A general charge or statement of the matter of fact is sufficient, and it is unnecessary to plead evidence.

Story's Equity Pleadings, §§ 28, 252 and 253.
Cowen vs Toole, 31 Iowa, 513,

Under a bill to set aside an award for fraud, a general charge is sufficient. Same reference, § 28.

A mere allegation with regard to a domestic instrument, that it is null and void, may be sufficient to enable the Court to adjudicate thereon. Same, § 248, and 6 *Beaver*, page 59, there cited.

The bill alleges (*supra* 42 § 12,) "that the B. & M. R. R. R. Co., by means of threats and scare lines, and other fraudulent devices and pretenses resorted to for the purpose of creating a fear in the minds of the people of Mills county, threatened that notwithstanding its contract and obligation to build its road on the line and route thus permanently fixed by them, unless other inducements were offered and given, it would abandon its said line and route through Mills county and go to other rival points above and below; that influenced and alarmed by these fraudulent practices, the then Board of Supervisors did entertain a proposition for a contract affecting the lands in controversy."

Do the proofs sustain this allegation? They surely do.

Joy, the President of the B. & M. R. R. R. Co., in his conversation with Bosbyshell (one of the committee) said that if the people of Mills county wanted that road they ought to settle the suit; that the county was fighting them by the suit, and they did not like to build a road through a community that was fighting them. He did urge the settlement of the suit as a means of getting the road, and said he did not know where it would go. (*Supra* 27.)

Fay swears that Haven, in charge of a surveying party of the B. & M. Company, was running a line from Red Oak to Council Bluffs, in July, 1868; that about the time of leaving, he told witness that he, witness, would not get the road, but that it would be built through Glenwood, and when told that it had been a big expense, admitted that it had, but said it had cost them but $6,000, and they had made $100,000 by it, as Mills county *had* withdrawn its swamp land suit. The chief engineers of the company—Theilson and Haven—had frequent secret conferences. (*Supra* 30.)

Hanks—one of that surveying party—swears that Theilson told them early in the season, and *before* starting from Red Oak (and of course before July 13th, 1868) that the road was to be built through Glenwood, "But told us not to tell it," (*supra* 31). Why not tell it? Was it because the lands had not yet been secured?

And yet, while it was well known to the company and its agents that the road would be built on the old line, Mr. C. E. Perkins tells the committee (the Board) at Burlington "he did not know if we could get it (the road) there"—through Glenwood and Mills county to Plattsmouth. "He could not guarantee what the company would do, that he would submit the proposition to the directors and would let us know." (*Supra* 37).

These threats, coming from such a source, and coupled with such acts, done at such a time and under such mysterious circumstances and in secrecy—the running of divergent lines, which is part of the building of a road, to a rival point, indicating a purpose to go there, in doing which it must leave its old line and Mills county and its county seat—were certainly present facts. These were statements

and tokens calculated to deceive and excite fear, and Perkins admits that he knew the committee (the Board) were actuated by the fears thus excited as an inducement to make the offer. (*Supra*, 40.)

It was, it is true, all a pretense, but herein is found the fraud. The pretense of the company that they were about to build their road on another line when they, and they only, knew all the while that it was to be built on the fixed line, and the obtaining of the *proposition for a contract* by such devices, constituted fraud.

This is why the Board of Supervisors of a great county were on their knees as suppliants at the feet of this giant which no contract or obligation could hold—no law could restrain—and no community could afford to ignore!

Fraud and oppression like this is of itself sufficient to avoid the contract as between the parties.

A false statement of its plans in a matter materially affecting Mills county, and on the subject to be treated for, with a view to force the officers and agents of the county into a contract by which the rights of the county would be sacrificed for the benefit of the railroad company, was certainly a fraud.

A single affirmative word upon a material matter tending to mislead and actually misleading is enough to establish fraud.

As between immediate parties, fraud makes all things void which are done under its direct influence, and this *proposition for a contract*, procured as it was by fraud and imposition, is no contract, on the ground that whatever is done through the influence of fraud is not done at all.

A conveyance obtained by fraud is treated in equity as if never made.

Lyon vs Whitlock, 15 Iowa, 37.

The fact of the fraud being perpetrated by agents does not alter the case.

If an agent makes fraudulent representations or does a fraudulent act, with or without the privity, or knowledge, or consent of his principal, and the principal adopts the bargain, and attempts to

reap an advantage from it so tainted by the fraud of the agent, he will be held bound by the fraud of the agent, and relief will be given.

Perry on Trusts, § 172.

And this holds good against the Chicago, Burlington & Quincy R. R. Co, for when once a fraud has been committed not only is the person who committed the fraud precluded from deriving any benefit from it, but every innocent person is so likewise, unless he has innocently acquired a subsequent interest; for by seeking to derive benefit under such a transaction, or to retain any benefit resulting therefrom it becomes *particeps criminis*, however innocent of the fraud in the beginning. Same reference.

The contract, then, was obtained by fraud, and is for that reason void.

The Board, in making the proposition, were acting as agents, *merely*, of Mills county, and of the county as *trustee*.

Their powers to offer and make such a contract were vital matters of inquiry to the other party.

The two objects—the compromise of the suit and the securing of a railroad—were widely dissimilar—almost to incompatibility and repugnancy,—but not more so than were the powers and capacities of the Board to offer and make the proposition or contract as to each of those objects respectively—and as to the things to be contracted for.

It is proposed now to examine and respectfully to submit to the Court some reflections, on

1st. The powers of the Board of Supervisors of Mills county to compromise this suit; considering at first their powers as agents of the county as trustee of a trust estate; and then the character of the instrument as a compromise of the lawsuit.

2d. The powers of that Board to contract away the swamp lands in consideration of the railroad company's building their railroad through the county.

3d. The character of the instrument as an entirety.

Viewed, then, as a compromise of a law suit and nothing more —ignoring for the present the railroad branch of the contract—we find,

1st. That the subject matter of that suit was certain lands.

2d. That the ultimate fact involved in that suit was the simple question as to whether these lands were swamp lands.

3d. That the highest tribunal of the State had decided that they were swamp lands, and that they did belong to Mills county as such.

What power had the Board of Supervisors to call that decision in question? Or, to sit in review of a judgment of the Supreme Court of the State of Iowa? What propriety was there in their entertaining for one moment a doubt of its correctness?

A judgment cannot be impeached or questioned collaterally, even by a court.

This Court even, would not now inquire into any of the matters that were settled by that decree and make a new decree, but would leave the old decree to be enforced. No tribunal short of that of the Supreme Court of the Ur'ted States had power to review or change that decree.

If this was swamp land—and the instrument itself is based upon the theory that they were (in fact it so names them, line 60, *Ante* p. 44)—theirs was a special trust. Special, particular and active duties were pointed out to be performed by them. Their powers also were special—the donor having given to the trustee special directions as to the application to be made of the property and its proceeds, as well as authority for carrying out the special purposes it had in view in instituting the trust—and these were essentially and pointedly adhered to in the State grant to the counties. (*Ante*, for the national grant 6, and the State grant 7.)

In a Court of law the trustee is the absolute owner of the trust estate. But in equity the *cestui que trust* is the owner.

Wormley vs Wormley, 8 Wheat., 241.

And the question in equity is how far the trustee can act without exceeding his powers. In trusts of a particular and active kind, such as this, the power of the trustee is limited to the exact performance of the duties imposed upon him, and the duty and power given in such trusts must be strictly performed.

Whenever a trust of this kind is created, the property affected by it is subjected to a double ownership—the legal ownership in the trustee and an equitable ownership in the *cestui que trust.*

The latter is an equitable right to a *specific execution*, being considered in equity, the estate itself. And the legal ownership of the trustee must be exercised under and subject to all restraints which are necessary to protect the rights of the equitable owner. This Court has held that

"A mortgagee of real estate is an owner in such a sense that he is entitled to notice of the assessment of damages, for a right of way over such property. Proceedings under an *ad quod damnum* after notice to the mortgagor *alone* will not defeat his paramount title."

Soverin vs Cole and the B. C. R. & M. Ry. Co. 38 Iowa, 463.

Corporations (says Lord Eldon, 1st *Ves and Bea*, 246,) can aleniate at law, but the alienee will be a trustee.

2 *Kent, page* *282, *C* (1.)

It has been a rule of universal application that trust property cannot, by any act of the trustee, be removed from the operation of the trust, in the view of the Court of Chancery, excepting by a conveyance or assignment of the legal interest to a *bona fide* purchaser for a valuable consideration without notice of the trust.

See 2*d Spencer's Equity Jurisprudence, page* 40, *marginal* (e) and (f).

Surely after such a controversy having been begun in 1863, the

B. & M. railroad company cannot deny knowledge and notice of the trust.

We do not here stop to show that the C. B. & Q. also had notice by record recitals, and other knowledge, actual and constructive, but proceed.

Again, funds supplied from the gift of the Crown, or from the gift of the Legislature, or from private gift to a corporation for any legal, public or general purpose are charitable funds to be administered by the Court of Chancery under its general jurisdiction.

2*d Spencer, page* 34, *marginal* (*k*).

The private conscience of the trustee is to be substituted by the general conscience of the Court of Chancery.

2*d Spencer, page* 917.

The trustee is not authorized to decide against the legality of his own trust estate. It is rather his duty to insist upon and maintain its legality. He must assume the validity of the trust under which he acts until it is impeached by some Court of competent authority. Having accepted and assumed the duties of a trustee, neither the State nor the county can renounce the trust.

Perry on Trusts, § 401.

And even if it were right in this case that the trustee should have a reasonable discretionary power to be exercised in emergencies, no such emergency existed. The trustee could not have been blamed for not acting. Mills county is a mere fraction of the great State of Iowa. The Supreme Court—the highest judicial power of the *entire* State, had pronounced the property swamp lands, and trust property, and more—they had pronounced the claim of the opposite party to be utterly groundless, and there were no conflicting decisions to raise doubt.

It is a rule that whatever powers may be possessed by trustees, whether general or special, if the trust is before the Court, and a decree has been made, the powers of the trustees are thenceforth

so far changed that they must have the sanction of the Court for all their acts.

The estate is charged with a trust, and the trustee will not, by his own volition, be permitted to do any act that will defeat the trust or destroy the rights of the *cestui que trust.*

"After a decree in a suit for an administration of assets, an executor is not at liberty to do anything which affects the relative rights of creditors."

Shewen vs Vanderhorst, 2 *Russ & Mylnes City R.*, 75.

"Under the common decree in an administration suit, a creditor applied to prove a debt which was barred by lapse of time, and the executor refusing to interfere, the plaintiff—a residuary legatee—insisted on setting up the objection of the statute—*held*, that it was competent for the plaintiff or any other party interested in the fund, to take advantage of the statute before the master, notwithstanding the refusal of the executors: whether the master is himself bound to take the objection, *query?*"

(*Same parties*), 1 *R. & M.*, 344.

"A trust estate was decreed to be sold for the payment of debts and legacies, and to be sold to the best purchaser. A articles to buy the estate of the trustees, and brings a bill to compel them to perform the contract. The trustees by their answer disclose this matter. The Court will make no new decree, but will leave the former decree to be pursued."

Annesley vs Ashurst, 3 *P. Wm's*, 282.

"Executors will not be allowed payments to creditors made after a decree for administering the debtor's estate."

"When an executor has paid a creditor part of his debt, the Court will not make any further payment to him out of either the legal or the equitable assets of the debtor, until all the other creditors are paid proportionally."

Mitchelson vs Piper, 8 *Simons, Chg.* 64.

"Devise of lands charged with payment of debts. If the devisee sell pending a suit by creditors for sale and payment of debts, such alienation is void. When an estate is charged with debts generally, in case of a sale before suit, the purchaser is not bound to see to the application of the purchase money, but if he buys after bill filed he is."

Walker vs Smallwood, Ambless City, 676.

These lands had been granted by the State to the county "for the purpose of constructing the necessary levees and drains to reclaim the same." This was a sufficient execution of the trust under which the State received them from the general government.

Montgomery Co. vs B. & M. R. R. R. Co., 38 Iowa, 208.

The phrases and terms used, and by which the lands and the title are vested in the county, are limited to a particular use or uses.

The county then held them in trust for that purpose. The trust was not performed; the funds arising from the sale of all the lands in controversy were needed to drain and reclaim the same and make and establish the levees that are necessary for that purpose. See plaintiff's amended petition. *Supra*, p. 47, §2.

It was a charitable fund, then, belonging to the people of Mills county, as its beneficiaries, and who were entitled to the benefits of the trust. They are created such by the action of Congress and the State. It was to promote the health and prosperity of the people living in the localities where the swamp lands were situated that these trusts were created. It is they—the people of the county, the beneficiaries in the trust, and the owners thereof in equity, and whose claims and rights were entirely ignored and surrendered to a hostile stranger to the trust, and that, too, in spite of a pronounced decree in equity establishing and securing to them their rights—who are now calling on the courts in the name of the county—in whose name only they can speak—to remove these fraudulent and baseless obstructions to the former decree of this court, in order that these trusts may be executed, and they may have their rights under the

former decree. And the court has the power to cause this contract to be cancelled.

Auburn Academy vs Strong, 1st Hopkins, 282.
Sanderson vs White, 18 Pick. 339.
2*d Kent's Com.*, 304, (marginal) 7th edition.

Gifts for the general comfort, ease and convenience of the people —rich as well as poor—such as draining and reclaiming of swamp and overflowed lands, rendering them fit for cultivation, preventing malaria and directly producing other advantages for the inhabitants, are public gifts or trusts, and held to be, and treated by the Courts as charitable.

Perry on Trusts, § 704.

And while private trusts which concern individuals are limited in their duration, and being for individuals, they must be identified within a limited period, for good reasons; on the other hand, public trusts or charities existing for the general and indefinite public, may continue for an indefinite period.

Perry, § 23.

And being a gift for a public and general good, though it might create a perpetuity, is not void.

Perry, § 687.

Courts look with favor on such gifts and take special care to enforce them, and guard them from assault, and protect them from abuse.

Perry, 687.

The privileges granted to the county under the swamp land grant by the State to her (*ante*, 7,) are conferred with a view to the public use and accommodation, and the county and its officers cannot voluntarily deprive themselves of the lands and real estate and funds which are necessary for that purpose.

There is a distinction between the property which the county held as such, and that property and interest in it which they held as subservient and indispensable incidents to the *public use* for which it was granted to them. When a public trust is so directly connected with property or its proceeds as that alienation of the property without receiving in return proceeds that can be applied in the execution of the trust, destroys the trust, there can be no such alienation. The title of the land came to the county as a part of this very trust. Without it or its proceeds, the trust must be worthless and must fail.

Ammant vs New Alexandria & Pittsburg Transportation Company, 13 Surgt & Rawle, 210.

This property, if trust property, could not have been sold under execution on a debt against the county.

Hart vs Burnett, 15 Cal., 568.

Nor for taxes.

Iowa R. R. Co. vs Story County, 36 Iowa, 49.
Guthrie Co. vs Carroll Co., 34 Iowa, 108.

Revision of 1860, § 711, and Code of 1873, § ~~707~~ 797, Art. 1. No diversion of the trust fund is tolerated at all.

These are some of the objections to the validity of this instrument which lie at the threshold of an examination of it.

It really does seem useless to pursue the inquiry further.

It was obtained by fraud and circumvention.

The Board of Supervisors, one of the contracting parties, was the mere agent of a trustee.

The property was trust property, and

It was the act of a trustee, surrendering the trust property to the stranger to the trust, whom the Court had declared to have no right to it, thus depriving the *cestui que trust* of its pronounced and judicially declared rights.

To call it a compromise is but a misuse of terms.

A suit having been already instituted and then pending for the execution of the trust, the trustee had no power to act without the sanction of the court.

If a suit has been already instituted for the execution of the trust, that takes the administration out of the hands of the trustee and transfers it to the court, the original power of the trustee is from that moment paralyzed, and the authority of the court must sanction every subsequent proceeding.

Lewin on trusts, page 417.

Walker vs. *Smallwood*, Amb. 676.

Anon 10 Ves. 104.

This may be the reason why the arrangement complained of was not presented to or brought to the knowledge of this court by the railroad company.

But as the defendants claim it to have been a compromise, let us examine it still further and see what it looks like as such.

A compromise is defined by Webster to be "An amicable agreement between parties in a controversy to settle their differences by mutual concession." And this is no technical meaning of the word, but is the one applied to it in common daily use, and is also the construction given to the word in Courts of justice.

Tested by this standard, is the instrument in questoin a compromise?

What differences were there to settle? Being the settlement of a law suit and nothing more, it must have been a settlement of the questions involved in that law suit. But as we have seen, the only question involved in that controversy was the simple one of whether the lands in question were swamp lands. This, then, was the difference, and the only difference that there was to settle or to make a compromise about. But this, from its very nature, the Board had, as we trust we have already shown, no power to determine originally, and much less could they do so after decree rendered, not having power to agree to anything which was either an abandonment of the trust or at variance with that decree.

There was then *nothing* to be contracted *for*.

Nor were they justified as trustees in compromising the suit for the convenience of strangers to the trust. Clamor of citizens of the county, occasioned by apprehensions of losing title to land or of losing a railroad, did not justify them as trustees, in making the conrtact, unless there was some advantage to be gained thereby to the *cestui que trust* as such, or to the trust estate.

Perry on trusts, 483.

Again, where are the mutual concessions? The instrument recites that there are in dispute between the parties to the suit 23,316 acres of land.

It then admits that the county of Mills owed the railroad company 23,316 acres of land (lines 10 and 11, *supra* 43,) which was every inch in dispute in the case, and a portion of which had

been disposed of by the county by *bona fide* sale, and as to which the railroad company could not have any legal claim upon the county.

It then offers to give to the railroad company odd sections vacant (most of which is part of the 23,316 acres,) and even sections *patented* to the county and unsold, (none of the latter having ever been in dispute in any manner, but being swamp land and trust property fully vested in the county, and in amount, as is to be seen by a reference to the deeds conveying them to the company—5,800 acres) in all, 9080 acres. (See plaintiff's abstract, 12, 13, 15, 16, 18 and 19.) This left a balance due the company of 14,236 acres.

It then tenders the R. R. Co. 4660 acres subject to pre-emption rights, but in great frankness and candor informs them that about one half of the pre-emptions are *fraudulent*, and ought not to be recognized, and as if in solemn mockery, asks the railroad company to let these pre-emptors have their rights; *asks* that where *bona fide* improvements have been made on the same, the pre-emptors must be secured in their rights to the same and have the privilege of purchasing at $1.25 per acre, of the county or company, which amount shall in any event go to the railroad company, even if it shall have been paid to the county.

The proposition next states that there was still due the company 9576 acres of land, and that as the county had given all the land it had, it would pay for these 9576 acres, which belonged to *bona fide* settlers and purchasers, ten thousand dollars in money.

It appears from the next section of the contract that the railroad company had been laying claim to portions of this 9,576 acres held by *bona fide* purchasers, and that the railroad company had been settling "with individual citizens" for them, and also that these 9,576 acres included lands which the "company had sold to citizen settlers at $1.25 per acre"—or, in plainer language, it is proposed the county should owe the company 9,576 acres of lands, and because portions of it had been purchased by settlers, in good faith, from another than the railroad company, which had therefore extorted "compromises" from them, and because, also, the railroad company had itself sold portions of these lands to the purchasers

for $1.25 per acre and pocketed the money, it now proposed to make the county pay it a *second time* for these lands.

What legal or moral obligation was then resting upon the county to pay the railroad company for lands sold by and paid for to it, and what authority can exist in a Board of Supervisors to make such a gift of $10,000, whether the proceeds of swamp lands or taxation?

Not satisfied with this, and as if to be sure that there might not be any remnants of this trust property yet lurking in some out-of-the-way place, the instrument winds up with the following *omneum gatherum*. "We wish it understood that the company shall have *all* the swamp lands the county holds or is entitled to in Mills county." See lines 59, 60 and 61, *supra* 44.

The only question involved in the action, as we have shown, was that of whether the lands were of the class known as swamp lands.

Considering this proceeding in the light of an appeal taken by the railroad company from the decision of the Supreme Court of Iowa, to the Board of Supervisors of Mills county, and that the said Board were then sitting as a tribunal for the purposes of such review, it will be noted that the decision of the Supreme Court stands *affirmed* by said Board since they find, as did the Supreme Court, that the lands in controversy were *swamp lands*, and this is not all: the Railroad Company, by accepting the instrument acquiesce in the decision and take them as swamp lands, and now hold them as such or not at all.

Now, then, after the Board of Supervisors have proposed, not to compromise, but to give away the case, and the swamp lands of the county, what concession does the railroad company make?—what does it bind itself to do, or to abstain from doing? There should be a *legal* consideration moving from it to the other party which was dealing so generously with it, otherwise the instrument is void for the want of an important element in a contract—a consideration.

It will be borne in mind that we are discussing the instrument now merely as the compromise of a law suit, and intend for the

present to ignore altogether the part of it which refers to the securing of a railroad.

We have been examining and discussing lines 10 to 39 inclusive —and it will be seen that if the railroad company agree to give anything except the railroad, it is to be found within those lines.

We claim that the company are bound to neither do or abstain from doing anything, in the limits thus presented—lines 10 to 39 inclusive, which are as follows:

"But the county must ask that when *bona fide* improvements have been made on the same (preempted lands) the preemptors must be secured in their rights to the same, and have the privilege of purchasing at a dollar and a quarter per acre, of the county or of the company, which amount shall in any event go to the railroad company. * * The remainder, 9,576 acres, belong to the *bona fide* settlers and purchasers who we must insist shall be protected by the county."

This, we presume, is what will be claimed as the "concession" on the part of the company.

But what is it that they here agree to do?

They are not expressly or impliedly bound to part with any money or property. Do they agree to give title to these *bona fide* pre-emptors? Do they covenant that they have title and to convey it to those pre-emptors? Do they agree, even, to refund to these pre-emptors, in case of a failure of the swamp land title, the purchase money—that either had been or was to be paid to the county by them for the land, which purchase money the railroad company was getting by this arrangement from the county?

The *county* has admitted that it owed the company 23,316 acres of land, to pay which it offers "land" "balance due you" "for further payment we offer you," "and as we have paid you all the land we have we offer you $10,000 in money to make up the deficiency."

Does the railroad company acknowledge that they owe anything? Do they agree to convey anything? No. All, and the most that can be claimed is that by acceptance of the instrument, the railroad company did, by implication, agree "*to let alone*" for the present,

at least, all those tracts of swamp land that were embraced in these clauses and covered by *bona fide* pre-emptions, and to which the vested rights of individuals had attached—that is, that they would, in consideration of this agreement, not litigate with the individual purchasers, owners and occupants of those tracts. But thesei ndividuals were not parties to this agreement, and this promise made by the company to the county for the benefit of these third persons, who are strangers to the consideration and promise, would not support an action by the latter.

Exchange Bank vs Rice, 107 Mass., 37.

There, is therefore, no benefit to the individual purchasers from the county arising from this contract, of which they could avail themselves, and the county certainly is not benefited, for it surrenders to the railroad company the purchase money paid to it by these pre-emptors, and is not relieved from its liability to them therefor on failure of title.

But, again, if it be claimed that in that action they were not estopped by the judgment, because of their appeal to the Supreme Court of the United States, and there was as yet no final determination by which they were bound, and that the instrument was designed to settle the doubts as to whether they were swamp lands or not. Now give them the benefit of the doubt. Let it be granted that they were not swamp lands. Were they at the date of this compromise, July 13, 1868, railroad lands? Their claim was based upon the certificates of the Commissioner of the General Land Office. But we have seen that these certiffcates were to the State of Iowa, and not to the railroad company; that they were consditional; (*Supra, page* 19,) and that under and by virtue of the land grant act of May 15, 1856, (*supra, page* 11, § 4,) which provides as follows, to-wit: "And when the Governor of said State shall certify to the Secretary of the Interior that any continuous 20 miles of said road is completed, then another quantity of land hereby granted, not to exceed one hundred and twenty sections for each 20 miles of said road completed as aforesaid, and included within

a conntinuous length of 20 miles of said road, may be sold, and of on from time to time until said road is completed; and if said road is not completed within 10 years no further sale shall be made, and the lands unsold shall revert to the United States,"—their right to the lands had expired by limitation of time,—the date of this act being May 15, 1856, the road having been completed to Osceola or Afton only, (see Perkins' evidence, *supra* p. 40), at the date of submission (July 13, 1868). The lands had already at that time reverted to the United States, under the provision of the act of May 15, 1856, under which the railroad company claimed them in that suit.

The State could not pass any title to or right in the lands except in the manner authorized by Congress.

The C. R. M & R. R. Co. vs Carroll County, et al, 41 Iowa, 153.

If thts *was* an agreement to forbear to sue or enforce a claim, and the claim was utterly unfounded and one upon which there was no good cause of action, it is void for want of consideration.

Story on Contracts, 5th edition, §556, note 3 authorities cited.

The waiver of a legal right which has no actual existence would not be a sufficient consideration.

Knotts vs Preble, 50 Ill., 226.
Wade vs Simeon, C. B. 548.

To say the least, there was inadequacy in consideration, and in cases of gross inadequacy the court will take advantage of every circumstance which indicates oppression or improper advantage to found a presumption of fraud, and thereby to rescind the contract.

Story on Contracts, §550, and authorities cited.

There was at least constructive fraud.

It was a fraud upon a public bounty.

An assignment of the half pay of a retired officer of the army is void, for it operates as a fraud upon the public bounty.

Stone vs Liddledale 2 Anst., 533.
Davis vs Duke of Marlborough, 1 Swanst., R. 74.
McCarthy vs Gould, 1 Ball & Beatty, R. 389.
Osborne vs Williams, 18 Ves., 379.

An act must not only be *bona fide* between the parties themselves, but must not be *mala fides* as to others who stand in such a relation to either as to be affected by the contract or its consequences.

Chesterfield vs Janssen, 2 Ves., 156–7.
Story on Contracts, 582.

The circumstance that the relief is asked by a party (admitting the county to have been a party) who is *particeps criminis* is not in equity material.

St. John vs St. John, 11 Ves., 535-6.
Bromley vs Smith, Daugl. R., 695–7–8.
Hatch vs Hatch, 9 Ves., 292, 298.

The reason is that the *public interest* requires that relief should be given, and it is given to the public through the party.

Roberts vs Roberts, 3 P. Will, 66, 74 and N. 1.
Browning vs Morris, Cowp. R., 790.
Morris vs McCulloch, 2 Eden, R., 190.

The Board was not *particeps criminis*, but stood *in vinculis*, and was compelled to submit to terms which oppression and their necessities imposed upon them.

Smith vs Bromley, Daugl. 996.
Basauquet vs Dashwood, Cas. Temp., Talb., 39.
Rawden vs Shadwell, R., 269.

Having now considered:
1st. The ability of the Board,
2d. The thing to be contracted for, and,
3d. The insufficiency of consideration;
And shown, as we trust, all these essential elements of a contract

to be wanting, there still remains one other element essential to a valid contract to be considered, and that is the assent of the county. In considering this element of the contract, that branch of it which refers to the securing of the railroad must be taken in hand, for the assent, if given at all, must be to the *entire* contract, leaving out none of its parts.

If the compromise of the suit was one of the motives which determined the will of the Board, there was certainly also another reason and motive which operated to determine that will, to-wit: the securing of a railroad. The instrument provides (lines 43 to 51 inclusive, *supra*, p. 44,) as follows:

"It is further understood that the foregoing proposition shall not be binding on the county of Mills unless said railroad company shall complete said railroad through Mills county, via Glenwood, and build a depot at Glenwood, in said county; and in case said railroad company shall fail or neglect to build said railroad through Mills county, via Glenwood, and also to build and establish a depot at Glenwood, in that county, then, and in that event, the said law-suit shall stand for final hearing in the Supreme Court of the United States, the same as if this proposition had never been made."

The building of the road, then, is made the *sine qua non* of the entire arrangement, and so much so that the suit is not to be deemed settled unless the road is built as stipulated. And here, now, we get the first glimpse of anything like legality upon which to base this instrument. Without this branch of the contract it is respectfully submitted that there is absolutely no semblance of legality in the instrument. For the devotion of the swamp lands and their proceeds to the building of a railroad through the county, there is provision of law. This instrument, then, so far as it looks, upon its face, toward the devotion of the swamp lands of the county to the building of a railroad through the county, the Board of Supervisors had the sanction of law for making.

Ten years prior to this time, on the 22d of March, 1858, the

legislature of Iowa passed an act which was in force when this arrangement was made, and the first three sections of which are as follows:

SEC. 986. "*Be it enacted by the General Assembly of the State of Iowa*, That it shall be competent and lawful for the counties owning swamp and overflowed lands, to devote the same, or the proceeds thereof, either in whole or in part, to the erection of public buildings for the purpose of education, the building of bridges, roads and highways, for building institutions of learning or for making railroads through the county or counties to whom such lands belong: *provided*, that before any of said land, or the proceeds thereof, shall be so devoted to any of the purposes aforesaid, the question whether the same shall be so done shall be submitted, at some general or special election, to the people of the county.

SEC. 987. "(2). The proper officer or officers of any county may contract with any person or company for the transfer and conveyance of said swamp or overflowed lands, or the proceeds thereof, or otherwise appropriate the same to such person or company, or to their use, for the purpose of aiding or carrying out any of the objects mentioned in the first section of this act, which said contract shall be reduced to writing and signed by the respective parties or their lawful authorized agents.

SEC. 988. "(3). Before such contract shall be of any force or validity, the same shall be published for four weeks immediately preceding some general or special election, in some newspaper published in the county, and if there be none published therein, then three copies of the same shall be posted in three of the most public places in each township in the county for the length of time aforesaid, together with a proclamation of the proper officers, and directing how and where the vote thereon shall be taken, and returns made and canvassed, and in what manner or form the people shall vote thereon; and if it shall appear that a majority of the people, in any county voting thereon, are in favor of the contract or proposition submitted to them, then, and in that case, such contract or

proposition shall be binding upon the parties thereto; but, if the majority of the people voting on such proposition are against the same, then it shall be null and void; *provided*, that no sale, contract, or other disposition of said swamp or overflowed lands shall be valid, unless the person or company to whom the same are sold, contracted, or otherwise disposed of, shall take the same subject to all the provisions of the acts of Congress of September the 28th, 1850, and shall expressly release the State of Iowa, and the county in which the lands are situate, from all liability for reclaiming said land."

These sections of the revision were in full force and effect when when the arrangement of 1868 was made.

The Legislature passed an act approved May 28, 1861. Chapter 8, page 7 of the acts of the extra session Eighth General Assembly.

Section 1 is as follows:

"*Be it enacted*, etc., That the swamp lands in the several counties be and the same are hereby placed under the control of the Board of Supervisors of said counties respectively."

The supervisor system took the place of the county judge system by an act which took effect July 4th, 1860, (chapter 22, article 11, of the Revision of 1860, pages 48, 49, 50.) Section 11 of that act—§ 312, Revision, part 3—provides that "the Board of Supervisors have power to make such orders concerning the corporate property of the county as they may deem expedient."

It appears to have been matter of doubt, and very properly so, whether the swamp lands were embraced by the term "corporate property." In proof of this see note in fine print on page 148 of the Revision of 1860 at the bottom of the page as follows:

"* Does the act creating the Board of Supervisors affect this chapter? See Chap. 22, Art. 11."

The star (*) refers to the act granting the swamp lands to the

counties. From this we can see what was the contemporaneous exposition of these acts, and that the object of the act of 1861 was merely to settle the question as to whether the county judge or the Board of Supervisors was the proper officers to control the swamp lands.

It conferred no new powers; it simply explained the phraseology of a prior statute.

This control was, we submit, to be exercised under the restrictions imposed by the sections above quoted from the Revision.

This is quite apparent from the passage of the subsequent act of 1862.

This act of March 31st, 1862, purports simply to amend section 986 of the revision, and does amend it by adding the creation of a permanent school fund, and the erection of county buildings, to the purposes specified in section 986, to which these lands might be devoted. It provides, however, as does section 986, for the previous submission of the question to a vote of the people, and further provides that the county shall not be relieved from its obligation to make drains, imposed by the act of Congress.

It is clear, then, on the reading of these acts, that a county could not devote its swamp lands, or the proceeds thereof, in whole or in part, to the building of a railway through the county, except upon the authority of a popular vote. The officers of the county might "contract" with a railway company for such a disposition of the land, but the statute said:

"Before such contract shall be of any force or validity, it must be published four weeks previous to the election, in some county newspaper with a proclamation as to the election, and if the vote should be in its favor, then the contract should 'be binding upon the parties thereto;' but if the vote should be against the contract, then it should 'be null and void,' with a further proviso that 'no sale, contract, or other disposition of said swamp, or overflowed lands, shall be valid, unless the person or company, to whom the same are sold, contracted, or otherwise disposed of, shall take the

same subject to all the provisions of the act of Congress of Sept. 28th, 1850, and shall expressly release the state of Iowa, and the county in which the lands are situate, from all liability for reclaiming such land.' "

The Legislature of Iowa, conld not, itself, violate its trust in regard to these lands

Low vs Hutchings, 41 Cal., 639.
Goshen vs Stonington, 4 Conn., 225.
Calder vs Bull, 3 Dall., 386.

And it could not authorize the Board to do what it could not do itself.

In view of these statutes, how could a devotion of these lands to a purpose expressly forbidden by the statute in the absence of a submission to a popular vote, be lawfully accomplished.

The contract provides, lines 40, 41 and 42, (*supra* 44,) that "the suit now pending shall be continued by agreement of the parties, from term to term, until the conditions of this contract or proposition shall have been complied with."

In view of this claim in the proposition for a contract, and of the statutes above cited, it is but a fair inference that the company on the one side, and the Board of Supervisors and their agents on the other, never contemplated that this proposition would be operative as a contract unless ratified by the people of the county, by a vote at an election, as provided by law. The presumption is that the Board of Supervisors intended to do nothing beyond what they had the sanction of the law for doing; and this is the legal construction of the contract, as much as if the provision for ratification had been expressly inserted in the proposition itself, and also in the resolution of November, 1868. See plaintiff's abstract, page 23.

The public law of the State entered into the contract and controlled it. Both parties were bound to know that the instrument would be of no validity unless thus ratified, and it must

be construed as meaning that the county would execute the contract if authorized by a vote of the people.

Sections 987 and 988 are peculiar. The first provides that the proper officers of the county may "contract" for the conveyance of swamp land to any person or company for the very purposes which are forbidden in section 986, "which said contract shall be reduced to writing, and signed by the respective parties, or their lawfully authorized agents."

The contract is then, in form, complete. This is what was done in the present case.

But then, section 988 provides that, "before such contract shall be of any force or validity," the same shall be published for four weeks prior to an election; and if the vote is adverse to the contract, "it shall be null and void."

These provisions are peculiar in requiring the contract to be made and signed before it is submitted to the popular vote.

It is impossible to avoid the conclusion that the parties had this statute in view when this contract was made. Whether they had or not, the contract was made under the statute. It was made in pursuance of the directions of the statute, and had the validity which the statute gave to it, and no more.

The statute was a part of it. The company can no more claim under it than it could if the contract had expressly provided that it was to be submitted to a popular vote, and was to be null and void if the vote was adverse.

The contract then could be assented to by the county, by popular sanction only, expressed in the manner provided for by law, and the resolution of the Board in November, confirming and ratifying the proposition, and ordering that the same be spread upon the records of the Board, was in effect, a mere nullity. Had they ordered a submission of the same to a vote of the people at some ensuing election, such an order would have been legitimate and proper.

The grant of the State to the county as a trustee having no beneficial interest, with power to sell, should be most strongly construed

against the trustee and most favorably to the beneficiary named in the trust.

And if a sale be subject to approval of the *cestui que trust*, (which was the case here,) the deed (contract) of the trustee to a purchaser will not pass the legal title without the approval of the *cestui que trust* in proper form.

Sprague vs Edwards, 48 Cal., 239.

The national grant was to the State, and not to the legislature of the State, and although the grant of the State, through its Legislature, was to the county, this did not pass to the county unlimited control of the lands, for, notwithstanding the grant to the county, the course of legislation shows that the State always retained legislative control over them.

Webster county vs Taylor, 19 Iowa, 121.

When the grant was made, and since that time, certain powers, as above quoted, were given to the county, to the Board of Supervisors and to the people in their primary capacity at the polls, and neither could act independently of the sovereign powers of the State. The powers of the Board, and what precise relation it bears to the county we are to ascertain from the numerous acts which have been passed from time to time by the Legislature, conferring jurisdiction upon it. The Board is not the *general* agent or representative of the county. It is a part of the State government, with specific powers, duties and functions, generally local to the county it is true, but derived from the State and not *from* the county, and subject to be altered and changed at the will of the Legislature without regard to the will of the county. It acts independently of the county in obedience to State laws. Duties imposed upon the Board of Supervisors, it performs as acts of obedience to the State Legislature directly as a State functionary, and not as an agent of the county. It is true it can bind the county in some contracts, subject it to some legal obligations and appropriate its money to certain

objects, but these powers it exercises by virtue of authority derived from the State government, and in obedience to State laws.

Reardon vs St. Louis county, 36 Mo., 560.

A county is not a corporation in the strict and proper sense of the term.

"A county is a political division and denominated a *quasi* corporation. It assumes on itself some of the duties of the State in a partial or detached form, and is to be considered in the light of an auxiliary of the government and as a secondary and deputy trustee of the people."

A county is not a private corporation but an agency of the State government, and although the legislature cannot take from the county its property, it has full power to direct the mode in which the property should be used.

State of Mo. vs the County Court of St. Louis County, 34 Mo. 545.

Cooley, in his recent treatise on constitutional limitations, lays down the doctrine that "counties, townships, school districts and road districts do not usually possess corporate powers under special charters, but they exist under general laws of the State, which apportion the territory of the State into political divisions for convenience of government, and require of the people residing within those divisions the performance of certain public duties as a part of the machinery of the State, and in order that they may be able to perform those duties vest them with certain corporate powers. Whether they shall assume those duties or exercise those powers the political divisions are not allowed the privilege of choice. The Legislature assumes this division of the State to be essential in republican government, and the duties are imposed as a part of the necessary and proper burden which the citizens must assume in the process of self-government. Their functions, therefore, are wholly of a public nature, and there is no room to imply any contract between them and the State, in their organization as corporate bodies,

except that which springs from the ordinary rules of good faith; that the property they shall acquire by local taxation or otherwise, for the purpose of their organization, shall not be seized by the State and appropriated in other ways. They are, therefore, sometimes called *quasi* corporations, to distinguish them from the corporations in general, which possess more completely the functions of an artificial entity.

Cooley on Const. Lim., 240.

And if any and all property is to be acquired and held, or disposed of by counties under provisions of law, and in no other way, why should this swamp land be an exception? It will be noted that the grant from the State is to the counties and *not* to the county judges (act of 1853, *supra*, page 7). Likewise that the power to *devote* the swamp lands is given *to the counties* and not to their Boards of Supervisors (see § 986, *supra*, 71).

The national grant (*supra*, 7) vests the lands in the State subject to the disposal of the legislature thereof, provided, however, that the proceeds shall be applied *as far as necessary* to the purpose of reclaiming, &c.

There is a discretion lodged in the Legislature and power to determine when there shall have been sufficient draining done. The balance that may be left it would be no violation of the trust to appropriate otherwise. This the congressional grant seems to have contemplated.

The legislature, in its grant to the counties, appears (*supra* 7) to have intended to provide for the exercise of this discretion by the county in saying that "the balance of said lands, if any there be after the same are reclaimed as aforesaid, shall be applied to the building of roads and bridges, when necessary, through or across said lands, and if not needed for this purpose to be expended in building roads and bridges within the county," and make the county and its officers a *secondary substituted trustee* to execute the trust. But no provision was made for the exercise of this function

of discretion. It was not given to the county judges, as was the execution of the trust in other respects, and when the legislature come to contemplate the exercise of the power to *devote* to purposes other than draining, appearing to apprehend danger of an improper diversion through the influence and inducements that might be offered by wealthy railroad corporations to weak county judges and members of the various Boards of Supervisors, passed the act above quoted as §§ 986, 987 and 988, requiring all contracts for the diversion to be submitted to the people in their primary capacity at the polls, and that if a majority voting are against the same then it shall be null and void; and providing further that it shall still be void unless the person or company to whom they are contracted shall take the same subject to the provisions of the congressional grant, and shall expressly release the State and county from all liability to perform the trust.

There is here manifested the purpose to provide for the execution of the trust, and to leave the question to be decided by the people in their primary capacity at the polls.

But apparently distrusting this act, they amended it by the act of 1862, above quoted (page 7.) In the latter, instead of allowing the county to shift upon another the duty of reclaiming, they provided "that no county is hereby released from its obligations to make the necesssry drains and levees contemplated by the national grant, and also the State grant (above quoted) to the counties.

The county, under Judge Cooley's theory, having no choice, its only remedy to protect itself against this burden and obligation is to vote the proposition down. This it would do unless the contracting party was willing and responsible, for, under the acts taken together the contracting party and the county are each responsible for the draining. To allow the Board of Supervisors, then, to make the diversion without a vote, is to allow them not only to divert a trust fund, but to saddle upon the county a duty and obligation that entail upon it heavy expenditures in the future. The county, then, and its inhabitants, have grounds of protest not only against the illegal surrender of the swamp lands, but against being without its

consent encumbered with a heavy debt, to be paid, of course, by taxation. There is, and was no such power in the Board of Supervisors. This must be done by vote of the people as provided by law. The law contemplates action by them in their aggregate capacity, when duly and properly assembled, with a proper contract duly submitted. Assent by the whole people, even, could in no other way be given. Incidental ratification of the acts of officers beyond the scope of their authority would be a most dangerous doctrine. The county is a body corporate. The power to make this contract is reserved by or conferred upon the people in their primary capacity. Certain powers, but of an expressly limited character in this matter, are conferred upon the Board, and among them is not the power of making this a valid contract and subjecting the people to this debt and burden.

Taylor vs District Township of Wayne, 25 Iowa, 450.

The proviso in the law is a limitation or exception to the grant made or authority conferred, the effect of which is to declare that the one shall not operate, or the other be exercised unless in the case provided.

If the property in question is swamp land, and if this arrangement be allowed to stand, the trust property is lost, and neither the company or county liable for the draining and reclaiming. And this result is reached not only without the sanction of law, but in violation of express statutes prohibiting the same.

The leading objects of these acts, §§ 986, 987 and 988, and the amendment of 1862, (the latter to be found on page 78, acts of 1862,) were:

1st. To leave the entire matter to the whole people in a body throughout each county.

2d. To deny to a few men the power or ability of deciding so important a matter.

The wisdom of this policy is apparent. The people throughout the

extent of the whole county—who knew by personal knowledge the condition of the lands in the locality in which they lived, who were the beneficiaries of the trust—were the proper parties to decide a matter so important to them and their interests. The people of the whole county who would have the obligation to meet, the burden to bear, in case of the devotion, and out of whose property by taxation the means would have to be raised to supply the place of the property thus given to others, and to pay the $10,000 that was to be given in addition—were the exact proper parties to whom, in principle, such matters should have been, as by law they were, submitted.

Again, it was wise to place the decision of questions pertaining to the welfare of the whole people of an entire county beyond the power of a few men, who could be more easily reached and influenced by the various kinds of inducements that it is always within the power of railroad companies to offer in an indirect manner, such as we trust has been shown to have been done in the present case.

From the terms of the instrument it is seen that the agents and members of the Board were seeking by the contract, to secure the railroad, and of course in treating upon the subject and agreeing to its terms, such as they are, the company are fairly to be considered as agreeing to *give* or *grant* the road as stipulated, and this is the very question that it was the policy of the law to prohibit the Board of Supervisors, composed of a few men, from deciding. Any personal interest of an agent or trustee in a contract subjects it to the scrutiny of the Courts, and always renders it void if objection be made by the *cestui que trust* or donor.

Trustees cannot, without the consent of the *cestui que trust*, or of a Court having jurisdiction over such matters, denude themselves of the trust.

Langdon vs the Congregational Church Society of Plymouth, 12 Conn., 127.

Of the local and personal and pecuniary interest of the agents and members of the Board to secure this road, there is perhaps no

doubt in the mind of the Court from the evidence and circumstances proven in this case. The arrangement then is void for that reason. All agreements which are founded on the violation of public duties and trusts are void. For every public officer is bound to be disinterested in the consideration of all public questions, and any contract which interferes with the free and unbiased exercise of his judgment in relation to a question of trust or confidence reposed in him is against public policy and good morals.

The general principal of law is that no man can faithfully serve two masters, whose interests are or may be in conflict. The law will not permit one who acts in a fiduciary capacity to deal with himself in his individual capacity.

Wormley vs Wormley, 8 Wheat., 441, 445.

Any motive of gain or profit to the trustee is fatal. It is as bad for this to be effected indirectly by the enhancement in value of the individual property interests of the trustee in consequence of the internal improvement sought to be secured, as if by money directly paid to and received by him.

Same reference, 447.

If one man out of the entire number composing the Board, and acting had a personal interest in the matter, it vitiates the whole.

San Diego vs S. D. & L. A. R. R. Co., 44 Cal., 112.
Pickett vs School District, 25 Wis., 552.

Again: The State of Iowa was trustee for two separate and distinct trusts—the draining and reclaiming of swamp and overflowed lands, and the aiding in the building of railroads—and lands were granted to and accepted by her which are to be applied scrupulously to the respective objects of the donor. They were each for the benefit of the public, but the manner in which the public are to be benefited is very distinct.

The B. & M. R. R. Company was well aware of the intention of the State not to embrace in the grant to it those swamp lands.

This it must have known from the memorial to Congress (*supra*, pages 13 and 14. So the company and its officers and all parties concerned then or subsequently, could, and must have known of the intention of the State not to grant them these lands.

An agreement of an ecclesiastical society to apply to the support of the university a fund bequeathed to it as a perpetual fund, for the maintainance of a free school, is fraudulent and void.

Bailey vs Lewis, 3 Day, 464.

Finally, and to close this branch of the argument. There seems to be no room for question that the swamp land act of 1850 amounted at least to an appropriation by law of all swamp lands within the State of Iowa, to the specific purpose of fulfilling the grant, and made an effectual reservation of them to be applied under the act to that purpose, and to no other, and pointed out the mode of designation for this special object of internal improvement.

More express words of reservation than those employed in the act of 1856, (*supra*, page 10,) were not needed for the purpose of making the reservation embrace these lands which had been thus specifically appropriated by the act of 1850 to fill this grant to the State of Iowa.

The language of Barbour, J., in *Wilcox vs Jackson*, 13 Pet., 513, may find a proper application here:

"Whensoever a tract of land shall have been once legally appropriated to any purpose, from that moment the land thus appropriated becomes severed from the mass of public lands, and no subsequent law, or proclamation, or sale would be construed to embrace it or to operate upon it, *although no reservation were* made of it."

A sale of lands so appropriated or reserved, and even a patent without further legislation to authorize it has been held to be void.

State vs Ham, 19 Mo., 602.
Brown vs Clements, 3 How. (U. S.) 667.

The political power over them was not wholly relinquished, but was to be exercised by the public officer to whom it was committed by the act itself, in good faith, and in such manner as to accomplish the object of the grant and the intent of Congress.

Foley vs Harrison, 15 How., (U. S.) 433.

This not having been done by that officer, but having been done by the State, and done to the satisfaction of Congress, as is shown by the confirmatory act of March 3, 1857, (*supra*, 17,) and the title in fee becoming thus vested in the State, it cannot be doubted that it did relate back to the date of the grant, and did vest by relation under the State grant in the counties, (*supra*, 7,) and such title is *prior* and superior to any title that could be acquired under the act of 1856.

French vs Spencer, 21 Howard, (U. S.) 239.
Louder vs Brant, 10 How., (U. S.) 248.
Ross vs Borland, 1st Pet., 664.
Rutherford vs Greene, 9 Wheat., 197.
Gibson vs Chauteau, 39 Mo., 588.

But such vesting in the counties was, as we have shown, subject to legislative control. Neither, then, the donor (the United States), nor the donee (the State), could make any other disposition of these lands.

Low vs Hutchings, 41 Cal., 639.

Shall the defendants, through an imposition, be allowed to *rob* the county of its rights, and obtain from its Board of Supervisors that which it was not in the power of either the Congress or State Legislature to grant?

Again, the contract is an entirety, and there are, to say the least, two considerations, and if one is illegal, and they are not susceptible of apportionment, it is void.

The instrument is not only *ultra vires*, it is illegal. In giving

The Federal courts have jurisdiction for the enforcement of trusts which arise out of rights and duties under the constitution and laws of the United States.

Irwin vs. *Marshall*, 20 How, 558.

Opinion, pages 564, 565 and 566.

When it becomes necessary to do so, a court of law will take judicial notice of the doctrines of equity, and of the relation of trustee and *cestui que trust*.

Sims vs. *Mariot*, 17 2, B. 281 (E. C. L. B. Vol. 79).

Westoby vs. *Day* 2 Ell. and Blackb. 624 (E. C. L. B. Vol. 75).

away the swamp lands it violates a public interest or policy, and in not receiving popular sanction is void by positive enactment. And further the arrangement is entered into on the other side with full participation in the guilt, and with full knowledge of the vice which contaminates it. They, the B. & M. Co., were not innocent persons parting with value, or otherwise changing their situation on the faith of this contract. The building of the road upon the old line they were already bound to do, and as commen carriers they were bound to establish depots at all suitable places for the convenience of the public, and Glenwood, being a county seat, was a proper place for one. They did not *continue* or leave the suit untried. "The case was argued by counsel;" so says the record recitals of the Supreme Court of the U. S. See plaintiff's abstract 107.

This fact can no longer be questioned. This record recital cannot be impeached. All evidence then to contradict this point is inadmissable, and the District Judge erred in not sustaining plaintiff's objections to the same, and the evidence, if admitted, does not really contradict this record.

Rohrer does not disprove it, see plaintiff's abstract, 168 and 169.

Strong rather corroborates it. He says, plaintiff's abstract, pages 162 and 163:

"My recollection is that at the time of filing the argument in the Supreme Court at Washington, the Mills county suit had been compromised, although I am not certain as to dates, but I am certain that before the hearing at Washington the Mills county case had been settled and compromised. The *same argument was made* and the *same briefs filed by counsel for defendant* in both cases as I recollect."

The plaintiff's petition avers that the arrangement was not treated as a compromise by either party to the suit, and that the suit was fully and stoutly contested by each party, and duly sub-

mitted for final decision upon its record and merits. In proof of this averment the record of the United States Supreme Court is adduced. (Abstract, 107.)

And while the suit was being tried in the Supreme Court, there was on the part of neither the company or the county anything done that looked to a treatment of the matter as *bona fide*. There was no submission to the people ordered—elections at which this might have been done were allowed to pass, and it was not done, nor is it shown that the railroad company asked it. On inspection of the proofs, too, it will be noticed that no sales were made by the company until after the 7th of February, 1870, the date of the decision, except to favorites, at $1.25 per acre.

I have prepared the following list showing sales made by the railroad company on or before the 7th day of February, 1870, as per Exhibit "G," to C. W. Spalding's deposition. See abstract, 146 and 147.

List showing all Sales made by the Railroad Company on or before February 7, 1870, the date of affirming judgment in the Supreme Court of the United States.

DATE.	DESCRIPTI'N.	SEC.	TWP.	RANGE.	ACRES.	PURCHASER.	PRICE.
October 27, 1863,	S-E S-E,	29	71	43	40	James Queen,	$50 00
" " "	S-E S-E,	17	71	43	40	Lyman Cutler,	50 00
" " "	S-W N-W,	21	71	43	40	T. S. Crewdson, }	100 00
" " "	N-W S-W,	21	71	43	40	T. S. Crewdson, }	
" " "	S-W N-E,	5	71	43	40	Edward Weeks,	50 00
" " "	S-E N-E,	5	71	43	40	Wm. Tresler,	50 00
" " "	N-E S-E,	5	71	43	40	T. S. Crewdson,	50 00
December 7, 1863,	N-W S-E,	5	71	43	40	Lucinda Wilson,	50 00
" 17, 1863,	S-E N-W,	11	71	41	40	Samuel Starr,	50 00
January 29, 1864,	N-E S-W,	17	71	43	40	P. L. Delashmutt, }	150 00
" " "	N ½ S-E,	17	71	43	80	P. L. Delashmutt, }	
" " "	S-W S-W,	21	71	43	40	A. P. Cutler,	50 00
" 30, "	W ½ N-E,	3	71	43	67.86	Wm. E. Dean,	85 00
" " "	S ½ S-E,	5	71	43	80	D. H. Epperson and Wm. Jones,	100 00
July 15, 1864,	E ½ N-W,	1	71	43	69.84	Thos. Wiles,	87 30
" " "	W ½ N-W,	1	71	43	69.62	A. H. Burger,	87 00
January 17, 1870,	S-W N-E,	24	72	41	40	D. N. Smith,	50 00
" " "	E ½ S-W,	1	73	42	80	H. C. Watkins,	100 00
" " "	N-E N-W,	31	73	42	40	D. C. Briggs,	50 00
*May 11, 1870,	N-E N-E,	7	74	40	40	Samuel Purcell,	800 00

*The first sale made by the railroad company after the 7th of February, 1870.

Whatever else may have been done in the meantime should be construed merely as looking *toward* a final compliance, and the deeds as intended, merely as instruments prepared in advance of the approving vote, and which, if it did not result in the affiirmative, should be treated as mere nullities. They could not be legally delivered until after the vote, because, without the vote there was no consent.

THE DEEDS DO NOT ESTOP THE COUNTY.

The claim of the company being void and groundless, the county has received no consideration for its deeds through the the quit-claim deeds from the company, and the county are not estopped from setting up this defense.

Sexton vs Dodge, 57 Barbour, 84. (1870.)
Bigelow on estoppel, 424.

To a deed granted in controvention of statute the law of estoppel does not apply.

Bigelow, 285.

A deed procured by fraud works no estoppel. Same, and

Hazard vs Irwin, 18 Pick., 95.
Partridge vs Misser, 14 Gray, 180.

And if a deed is void there is no estoppel.

Stevens vs Hayes, 1 Ind., 247.
Housatonic Bank vs Marten, 1 Met., 294, 307.
Germona vs People, 1st Hill, 343.
Jackson vs Brinkerhoff, 3 Johns, Cas., 101.

It is an essential element to the estoppel by deed, that the deed itself should be a valid instrument.

Bigelow, 283.
Fairtitle vs Gilbart, 2 T. R., 169

If the truth appears on the face of the deeds or a contract to which it refers as a basis, there is no estoppel.

Bigelow, 293.

The deeds, though granted by an order of the Board, if they had no right to pass it, do not estop the county or its officers from setting up the invalidity of the order.

Day vs Green, 4 Cush., 438-9.

The Court has power to cause this contract to be cancelled.

1*st*. *Hopkins*, 282.

The county is not estopped by having treated the deeds as valid.

People vs White, 54 Barbour, 622. (1869.)
People vs New York, 1 Hill, 362.

The Chicago, Burlington & Quincy Railroad Company, in its answer (plaintiff's abstract, page 31, § 2) alleges that it is the owner in fee simple of all the lands in controversy in this action which had not been sold by the B. & M. R. R. R. Co. prior to December 31, 1872, or which by its consent and direction have been sold by the B. & M. since December 31, 1872. This is denied by plaintiff. (See plaintiff's abstract, page 57, §1.)

Exhibits "A" and "B" to the said answer of the C. B. & Q. (found on pages 42, 43 and 44, plaintiff's abstract,) are alleged (see § 3 of their answer) to contain a particular description of the lands so sold—"A" of those sold prior, and "B" of those sold after, the 31st day of December, 1872.

To these lands the C. B. & Q. disclaims title or claim and all interest therein, except such as it may have by failure of purchasers to perform. (§ 4.)

To these pleas (3 and 4) plaintiff replies: "A want of information." Abstract, 57, § 2.

The remaining portions it claims as its property by purchase from the B. & M. on said 31st of December, under and by virtue

of an instrument attached, and which is to be found on pages 50 to 54 of plaintiff's abstract.

The following table shows the aggregate amounts as therein stated of lands sold and receipts:

Swamp selections in controversy Sold by the Railroad Company, prior to December 31, 1872.

Total No. of Acres.	Total Amount of Sale.	Amount Paid to Jan. 1, 1876.	Amount Unpaid Jan. 1, 1876.
About 3,600.	$34,658 87	$9,525 14	$25,133 73

As shown per Exhibit "G" to C. W. Spalding's deposition.

Swamp Land selections in controversy Sold by Railroad Company, subsequent to December 31, 1872.

Total No. of Acres.	Total Amount of Sale.	Amount Paid to Jan. 1, 1876.	Amount Unpaid to Jan. 1, 1876.
About 4,440.	$58,885 14	$6,661 32	$50,066 72

As shown per Exhibit "F" to C. W. Spalding's deposition.

Grand Total No. of Acres.	Grand Total Amount of Sales.	Grand Total Amount Paid to Jan. 1, '76.	Grand Total Unpaid to Jan. 1, 1876.
About 8,040.	$93,544 01	$16,186 46	$75,200 45

As per Exhibit "F" and "G", Spalding's deposition, see plaintiff's abstract, 144, 145, 146 and 147.

What rights or immunities has the C. B. & Q. that the B. & M. has not or would not have? None, as we claim, for—

1st. The B. & M. R. R. Co. under which the C. B. Q. claims title, if the view of the case urged by us is correct, never had even a *prima facie* or colorable title. The Supreme Court of the State of Iowa, and also the Supreme Court of the United States had both decided that the acts of congress had never vested any title in the B. & M. R. R. Co. The C. B. & Q. knew at the time it claims to have bought, or was bound to know that its grantor had derived no title from the government.

And the statement of President Walker, (see plaintiff's abstract 161):

"At the date of the lease or consolidation, I supposed at that time, and believed, that the lands in controversy constituted a part of the grant of May 15, 1856, made to the State of Iowa, and by the State of Iowa to the B. & M. R. R. Co. to aid in the construction of that road. I did not know that Mills county claimed them; no information was given the Board of directors of any outstanding claim thereon by Mills County, or by any other person. The corporation supposed and believed, so far as I know, and so did I at the time of making the lease, that a complete and perfect title was being acquired to these lands—"

Is incompetent, irrelevant and immaterial, and plaintiff's motion to suppress should have been sustained, and the Court erred in not so ruling. This evidence cannot avail the C. B. & Q. This record is conclusive. Mills county, by virtue of the decree in chancery in her favor, obtained and was declared to have an absolute legal title to all the lands in dispute in that action. So long as that decree remained in force the title could not be impeached by the B. & M. R. R. R. Co. or any person claiming under it by conveyance made pending the suit in chancery or after the decree.

Again, plaintiff, in her petition, (see plaintiff's abstract, page 5, § 3), avers not only that the former action was, on writ of error, in

the Supreme Court of the United States, reaffirmed, but that it was duly submitted upon its merits and record to abide the decision of a similar case which was contested fully on both sides, and avers that all claims of the B. & M. which were and are based upon acts of Congress, and Federal and State officers in pursuance thereof have been duly adjudged, tried and determined.

To this averment the defendant, the C., B. & Q., in their answer, (abstract, pages 35 and 36, § 23,) say:

That said suit, the Mills county case, was not stoutly contested by each party thereto; that neither party gave the same any attention whatever after the settlement, except to direct a continuance.

They admit that the same was submitted to abide the decree of said Court in a case pending therein, wherein Fremont county, in the State of Iowa was plaintiff, and the B. & M. Company was defendant, in which issues were involved similar to those in said case of Mills County against the B. & M. R. R. R. Co.

The plaintiff, in her reply, denies only such averments as are inconsistent with or contradictory to the averments of the petition. (Abstract page 60, § 13.)

These are the averments on this important point, and there is no disagreement or issue made upon the following facts:

1st. That there were two causes pending at the same time in the United States Supreme Court.

2d. That the issues therein were similar.

3d. That the B. & M. Company was defendant below, and plaintiff in error in each.

4th. That Mills County, Iowa, was pliantiff below and defendant in error in one, and that Fremont County, Iowa, was plaintiff below, and defendant in error in the other.

Now we have seen the issues that were formed in the Mills County case (*supra*, pages 20, 21 and 22, which are printed in full

with exhibits in plaintiff's abstract, pages 85 to 107,) and that among them was the claim on the part of Mills County that the lands in controversy were swamp lands and belonged to her as such, (denied by defendant), and that of the Railroad Company that they were granted under the land grant act of May 15, 1856, and thereunder certified to the State as inuring to them (denied by plaintiff.) That decision in the Fremont County case is conclusive.

These, then, were (under this admission) also the issues in the Fremont County case, as they were similar, and they were tried and settled in that case finally and conclusively as to the issues of fact therein tried, and these facts cannot be again successfully raised by either the B. & M. or the C. B. & Q., which claims under them or any other party claiming under either.

The certificates put in issue and the claim of the company based thereon were the same in each case. They were issued for the same purpose, under the same law. The lands which were embraced in them happened, some of them, to be in Mills county, and some of them in Fremont county. If null and void as to the lands in Fremont, they were likewise so as to the lands in Mills county. If not entitled to the lands in Fremont county, the company were likewise not entitled to the lands in Mills county, for it is admitted that the issues of fact were the same. And the converse is true, that if the certificates were good as to the lands in Fremont county, they were likewise good as to the lands in Mills county.

The adjudication of these questions for or against either party in the Fremont County case, must then be treated as conclusive evidence and such adjudication may be pleaded in Bar, to the same issues when raised, as it is attempted to do in this case.

Whitaker vs Johnson County, 12 Iowa, 598.

Citing and based upon—

Gardner vs Bucklee, 3 Cowen, 120.
Castle vs Noyes, 4 Ker., 329.

Doty vs Brown, 4 Comst.. 71.
Burt vs Sternbergh, 4 Cow., 559.
Outram vs Moorewood, 3 East., 346.
Bochaud vs Dias, 3 Denio, 238.
2 *Greenleaf Ev.*, 352.

Whitaker vs Johnson County is cited with approval in

The City of Davenport vs The C., R. I. & P. R. R. Co., 38 Iowa, 640, (June term, 1874,) and

Hackworth, Guardian, vs Zollars, 30 Iowa, 437.

Hackworth vs Zollars goes farther and holds—

"That a party cannot relitigate matters which he might have interposed, but failed to do in a proper action between the same parties or their privies and in reference to the same subject matter."

Citing on this point—

Dalton vs Laue & Guye, 13 Iowa, 538–542.

The decree of the District Court of Fremont county, Iowa, was as follows, to-wit:

"FREMONT COUNTY,
(No. 126 Ch.) *vs*
THE BURLINGTON & MISSOURI RIVER RAILROAD COMPANY.

Now at this time this cause coming on to be heard and the court having heard and examined the allegations of the parties, the evidence submitted and the arguments of counsel, and being fully advised in the premises, finds the facts stated in the petition to be true, and that the plaintiff is entitled to the relief therein prayed for.

It is therefore ordered, adjudged and decreed by the court, that

the title in fee simple to the lands described in the plaintiff's petition, to-wit:

(Here follows a description of the lands.)

Containing in the aggregate 12,754 and 19-100 acres, and every part and parcel thereof is legally vested in the plaintiff, and it is adjudged and decreed by the court, that the said plaintiff to-wit Fremont County, is the owner in fee simple of said lands, and is entitled to the uninterrupted controll, use, benefit and enjoyment of the same.)

And it is further adjudged and decreed that the claim of the defendant, to-wit, the "Burlington & Missouri River Railroad Company" to said lands and to each and every parcel thereof is illegal, null and void.

And it is further adjudged that the defendant pay the costs of this suit, taxed at ——— dollars, and that execution issue therefor."

This decree, together with the record in the Fremont County case, was offered in evidence by plaintiff, but was objected to by defendant. Objection sustained, to which ruling the plaintiff excepted at the time. In this the Court erred, and this ruling is assigned as error.

It will be observed that the two decrees are the same precisely.

For the decree in the Mills District Court, see *supra*, page 22;

And for affirmance in both the Fremont and Mills County cases by the Iowa Supreme Court, see *supra*, 23;

And for the action of the U. S. Supreme Court, see plaintiff's abstract, pages 106 and 107;—

From which it will be seen that the District Court adjudged and decreed that the title in fee simple to the lands in controversy is legally vested in the plaintiff—Mills County, Iowa,—and that she

is the owner in fee simple and entitled to the uninterrupted control, use and enjoyment of the same.

And further, that the claims of the defendant—the B. & M. R. R. R. Co.—thereto is illegal, null and void.

And this was made conclusive and binding on the B. & M. and the C. B. & Q., and all others claiming lands under either of them, *by the decree* in the *Fremont Coonty case*, and there was no compromise attempted in that case.

All issues of fact that were embraced in the Mills County case are conclusively adjudged in the decree in the Fremont County case, and in affirming the decree of the District Court in *that* case the decree above cited in the Mills County case was also affirmed conclusively.

The Court will bear in mind that it is claimed by us that the Mills County decree is still in force, having been affirmed by the Supreme Court of Iowa, and not afterwards modified or reversed by the Supreme Court of the United States or affected by the compromise, (*supra* 24 and 25).

And again: If the C. B. & Q. confesses, but avoids this decree of affirmance, on the ground that the affirmance by the State Court was superceded by the writ of error to the Supreme Court of the United States, and that the decree of affirmance by the latter is ineffectual, because it was rendered by mistake and is not binding, because the parties had agreed not to litigate, but had compromised, this is enough for our purpose; it admits knowledge on their part of the existence of the instrument in controversy, and this knowledge works a notice to them of all the facts that invalidate the contract as to their grantors, the B. & M.

The C., B. & Q. then did know, or must be taken as having known that, if our position is correct, its grantor had derived no title from the county of Mills.

"Knowledge of a fact is equivalent to notice."

Rogers vs Rhodeback, 5 N. Y. Leg. obs., 334.

"Whatever is sufficient to put a purchaser on inquiry, is, in equity, considered as notice."

Hawley vs Cramer, 4 Cow., 717.
Pitney vs Leonard, 1st Paige, 461.
Pendleton vs Fay, 2 Paige, 202.
Troup vs Hurlburt, 10 Barb., 354.

"When a purchaser has knowledge of any fact sufficient to put him upon enquiry as to the existence of a conflicting right, he is presumed to have ascertained the extent of it."

Williamson vs Brown, 15 N. Y., 354.

"One who purchases with knowledge of circumstances that ought to have put a prudent man upon an inquiry which, if prosecuted diligently, would have disclosed the fraud of his vendor, is not a *bona fide* purchase.

Baker vs Bliss, 39 N. Y., 70.

And further, in regard to that judgment in the Mills county case in the Iowa courts, and the effect the subsequent proceedings in United States Supreme Court had upon it.

The instrument could not have been a compromise of the suit pending in the Supreme Court of the United States.

The appellate jurisdiction of the Federal Courts depends on the *constitution* and the acts of Congress. When these do not confer it, the courts cannot assume it, by virtue of agreement of counsel or otherwise.

The Lucy, 8 Wall., 307.

This instrument, so far as it was an agreement to compromise, could have no effect in the United States Supreme Court, it could if a compromise be a compromise only of the suit in the Iowa Courts. Could the Board of Supervisors do this?

2d. The C., B. & Q. must be held to have known the precise character of the deeds from Mills county, for—

1st. The record recitals of those deeds were sufficient to put the C. B. & Q. upon inquiry, and those record recitals referred them to the suit, and by an examination of the records of this suit they could have found the defects in their title, the trust character of the lands in controversy, and the illegality of the contract and deeds.

"A purchaser from one deriving title under a deed containing reference to the stipulations of a contract pursuant to or in connection with which the deed was made, will be held chargeable with notice thereof."

Hall vs Orvis, 35 Iowa, 370.
Ruder et al vs Barr et al, 4 Ohio, 459.

"Purchasers under letters patent reciting a trust are bound to take notice of the trust at their peril."

1 *Ves.*, 261, 319.
1 *Ch. Cas.*, 258.

NOTICE OF DOUBTFUL EQUITIES.

"Where upon the records and facts it is plain what construction the court will put upon them (and when the court has already put this construction, as in this case, the doubt, even, has been removed), they should be enforced, however difficult their construction might be, even as against a purchaser."

Perry on Trusts, §833 note 4.
Thompson vs Simpson, 1 *Dr. & War.*, 491.

"A special authority must be strictly pursued, and a purchaser is presumed to know such authority when it is given by a public

statute, and if he purchases when the authority is not pursued it is at his peril."

Demming vs Smith, 3 *John Ch.* 344-5.

The same argument serves to fasten notice and proof of knowledge upon the numerous minor defendants and individual purchasers.

But again, the following is the list of the directory of both companies at the date of lease or consolidation:

DIRECTORS OF THE

B. & M. R. R. R. Co.,	*C. B. & Q. R. R. Co.*,
J. W. Brooks, Pres.,	J. W. Brooks,
Alpheus Hardy,	
L. Tuckerman,	
J. A. Burnham,	J. A. Burnham,
J. M. Forbes,	J. M. Forbes,
N. Thayer,	N. Thayer,
R. S. Watson,	R. S. Watson,
C. E. Perkins,	
J. F. Joy, (9).	J. F. Joy,
	J. N. Dennison, *
	Erastus Corning,
	J. C. Green,
	L. Bartlett,
	C. S. Colton,
	J. M. Walker, Pres., (12).

*J. N. Dennison signed as Secretary of the B. & M., (see plaintiff's abstract, page 54.)

See Perkins' testimony, plaintiff's amended abstract, page 210.

Six of the above directors were common to each, and two-thirds of the directors of the B. & M. and one-half of the directors of the C. B. & Q. were the same persons.

Notice to several directors of a bank, taking a note by endorsement, of fraud in the consideration of the note, is notice to the bank. uch notice may well be presumed, when some of the directors of the bank are also directors of an insurance company by whom the note was endorsed to the bank, and in whose hands the note was void for fraud.

City Bank of Columbus vs Phillips, 22 Mo., 89–90.

The knowledge acquired by the officers of a corporation while in the discharge of their official duties is the knowledge of the corporation.

Mechanics' Bank vs Schaumberg, 38 Mo., 228.
Hart vs the F. and M. Bank, 33 Vt., 252.
Blumenthal vs Brainerd, 38 Vt. 410.

If the agent at the time of affecting the purchase has knowledge of any prior trust or fraud affecting the property, no matter when he acquired such knowledge, his principal is affected thereby.

Dresser vs Norwood, 17 Common Bench, N. S., 466.

Knowledge communicated to the principal himself he is bound to recollect; but in regard to the agent, if he acquired it previous to the purchase the presumption that he still retains it and has it in his mind, may depend on the lapse of time and other circumstances. Here the lapse of time is not very great, if there is any. The B. & M. directory were fresh in their connection with this matter. The submission of the contract to the people for a vote was in October, 1871, and they had knowledge of this, for it was made by their procurement. (See plaintiff's abstract, page 108, Whitfield's evidence.)

And the large amount of property, some 14,000 acres of land worth about $10 per acre and $10,000 in money, (see testimony of D. M. Whitfield, plaintiff's abstract p. 108, and for value exhibits F. and G., showing amounts of sales, plaintiff's abstract, page 144–7,) if intended to be embraced in the transaction of Dec. 31,

1872, were of sufficient magnitude and notoriety to have brought the matter to the minds of the members of the B. & M. directory at that time.

Notice of the facts to any of the directors who act in the particular matter is sufficient to bind the corporation, although the other directors of the Board had no knowledge thereof.

Bank of United States vs Davies, 2 Hill 464.
Fulton Bank vs N. Y. & Shome Canal Co., 4 Paige, 137.

The above shows and brings actual knowledge to 7 out of 12 of the C., B. & Q. directors.

See § 139*a*, 140 and 141 *b and c*, *Story's Agency*, 5th Edition.

Directors of corporations being in duty bound to know the proceedings of the body are estopped from denying knowledge and alleging ignorance

Stone vs Great Western Oil Company, 41 Ill., 85.

The C. B. & Q. must be held, then, to notice of whatever the B. & M. Company knew.

It is submitted that it is a sufficient answer to the claim of "innocent purchaser" to say that there has never been a sale, but simply a consolidation of the stock of the two companies. The stockholders of the B. & M. R. R. R. Co. became stockholders of the C. B. & Q. They added their stock to the stock of the C., B. & Q. and took a part of the joint stock thus created. It is submitted that this should not be regarded as a purchase by a third person for a valuable consideration.

Mr. Perkins in his deposition calls it a consolidation, (see plaintiff's abstract, 108.) He says, also, (plaintiff's abstract, 153), I am now a director in the consolidated lines—the B. & M. and the C., B. & Q.

The purchaser of property of a trustee, with notice of the trust,

shall be charged with the same trust, with respect to the property as the trustee from whom he purchased.

Perry on Trusts, § 217, Note 4.

And even if he pays a valuable consideration with notice of the equitable rights of a third person, he shall hold the property subject to the interests of such person.

Perry on Trusts, § 217, Note 4.

After a purchase is once made from a trustee, with notice of the trust, the person taking the title cannot bar the interest of the *cestui que trust* by buying in other interests or procuring the assignment to himself of outside mortgages or terms 4.

Same reference.

Having once taken with notice of the trust he is a trustee in law, and a trustee cannot defeat the interests of his *cestui que trust*. On the contrary, all the interest the trustee or constructive trustee shall thus buy in will inure to the benefit of the title of the *cestui que trust* 5.

(Same reference, Note 5.

Defendant's purchases of outstanding tax titles inure then to the benefit of Mills county if a purchaser with notice of the trust.

"If a trustee convey the estate by a breach of trust the *cestui que trust* may follow the estate into the hands of a *volunteer*, whether he had notice of the trust or not."

Perry on Trusts, § 828, note 1.

And into the hands of a purchaser for value if he has notice of the trust 2.

Same reference, but note 2.

The *cestui que trust* can follow the proceeds of the trust property sold to a third person so long as it can be traced.

Perry, 835.

An abuse of trust can confer no rights on the party abusing it, nor on those who claim in privity with him 4.

Perry on Trusts, § 835 and citations.

And an abuse of trust can deprive the *cestui que trust* of no rights so long as its property or its proceeds can be traced and identified in the hands of all those who have full knowledge of all the equities 8.

Same.

See also § 836, and citations.

Equity has always asserted its jurisdiction to see that as to property held by municipal corporations *in trust* or clothed with public duties, the trusts were performed and the public duties discharged.

2 *Dillon on Corporations*, § 729.

"Municipal corporations possess the incidental or implied right to alienate or dispose of the property, real or personal, of the corporation of a private nature unless restrained by charter or statute. They *cannot of course* dispose of property of a public nature in violation of the trust, upon which it is held. The distinction is between property which a corporation may own as a natural person, and that which it holds in general or special trust."

Dillon, § 445.
See Warren vs the Mayor of Lyons City, 22 Iowa, 356–7.

Counties reach low in the scale or grade of corporate existence.

Dillon, § 10*a*.

If a given appropriation of a trust fund or property, be not consistent with the trust but, for purposes foreign to it, the Attorney General has a right to file a bill in equity asking that the fund may be recalled, secured and appropriated for the public, or in other words, charitable purposes, to which it is by the act devoted.

Attorney General vs Aspinwall, 2 Mylne and Craig, 618.

For convenience of reference and without further quotations, the Court is referred to the following sections and their citations of Dillon on municipal corporations, §§ 73, 373, 383, 384, 750, 730, 728 and 447.

The members of the governing body of a corporation may be considered as its agents, bound to exercise its functions for the purposes for which they were given, and to protect its interests and property; and if such agents exercise those functions for the purpose of injuring its interests or alienating its property, the corporation will not be estopped in this (equity) Court from complaining, because the act was ostensibly an act of the corporation.

2d *Spencer's Equity Jurisprudence*, page 36, (marginal) (a).
Attorney General vs Wilson, 1 Cr. & P., 24, 27.
Charitable Corporation Cons., 2d Atk., 405.

On kindred points, see also

Frost et al vs Belmont, 6 Allen, 160.
Attorney General vs Norwich, 16 Simons, 225.
Attorney General vs Lichfield, 13 Simons, 547.

In the answer of the C., B. & Q. (plaintiff's abstract, page 61, § 26) defendants aver that the lands in controversy in the former suit at the date of the compromise, in truth and in fact belonged to the B. & M. R. R. Co., and not to the county, and that the county had then no title to or equitable interest therein; that they did not fall properly within the swamp land grant of 1850; that they were all odd numbered sections lying within the limits as provided by the act of May 15, 1856, granting lands to the State to aid in the construction of railroads; that they were selected in pursuance of the act of the General Assembly of Iowa, of July 14, 1856.

And in § 28, page 62, defendants aver that the said lands have not been patented to the State of Iowa by virtue of the swamp land act, as swamp land, but that the claim of the State was rejected by

the Commissioner of the General Land Office, and that they were by him certified in due form to the B. & M. R. R. R. Co., as lands falling within the purview and meaning of the said railroad grant, and which said lands had been selected with reference to the line of the B. & M. R. R. R. definitely located and fixed July 25, 1856, and after the location, and in October, 1856, they were duly withdrawn from sale by the Secretary of the Interior, for the benefit of the B. & M., and subsequently certified to said company.

To these averments the plaintiff, in her reply, (abstract, page 62, § 17,) says that the allegations in regard to the certificates of lands by the then Commissioner of the General Land Office to the B. & M. ought not to be regarded by the Court in this action, for the reason that by the decree in the action herein referred to, said certificates were declared a nullity, and were already set aside. Wherefore plaintiff says that said allegations and said certificates are "*res adjudicata*," and this Court cannot now entertain the same. And all other averments contrary to the petition are untrue, and are sufficiently denied. (See, also, plaintiff's denial in § 16, page 61, of abstract.)

That these matters were all embraced in the former action can be seen by reference to the issues therein joined. See plaintiff's abstract, pages 85 to 89 inclusive, where the pleadings are given at length. See, also, *supra*, pages 20, 21 and 22 for the substance, and for the decree page 22.

"A judgment of a court of competent jurisprudence upon a material matter, put directly in issue by the pleadings, is *res adjudicata* as to that issue, and the parties are estopped by the judgment from litigating it again."

Jackson vs Lodge, 38 Cal., 28.
Betts vs Starr, 5 Conn., 552.
King vs Chase, 15 N. H., 15.
Chase vs Walker, 26 Maine, 558.
Smith vs Whitney, 11 Mass., 446.
Canfield vs Monger, 12 John., 347.

See also *supra*, 93–94.

Carl vs Knott, 16 Iowa, 379.

And this applies to the C., B. & Q.

Gray vs Coan et al., 40 Iowa, 327.

"And it is not only final as to the matter actually determined, but is so as to every other matter which the parties might have litigated and had decided under the pleadings."

Bruen vs Hane, 2 Barbour, 596.
Southgate vs Montgomery, 1st Paige, Ch. R., 47.
Simson vs Hart, 14 John., 77.
" " 1 John. Ch. R., 97.
Dalton vs Laue & Guye, 13 Iowa, 538–542.
Hackworth vs Zollers, 30 Iowa, 437.

If the B. & M. company, then, had other matters of defense which it might have interposed, such as title or claim from any source other than the grants of 1856 of Congress and the State of Iowa and the certificates issued thereunder, it should have done so, and it cannot now be done.

In regard to the averment that the county had no title, and they had never been conveyed to the county, we say:

This is a matter that was adjudged in the former action, and by the decree (*supra* 22) was found in favor of the county.

It may be added that the lands granted by the swamp land grant were, by that act *ex proprio vigore*, effectually appropriated and reserved for the purposes of the act, and by the selections and the confirmatory act (*supra* 16,) were rendered certain, and the legislative grant became complete to vest the title in fee even without a patent, the issuing of which is a mere ministerial act.

Fore vs Williams, 35 Miss., 533.

If it be denied that they did at once vest *ex proprio vigore*, as it has been held that they did in

Allison vs Halfacre, 11 Iowa, 450.
Page County vs B. & M. R. R. R. Co., 40 Iowa, 520.

The grant by the State to the counties (1853) was prior to that of the State to the R. R Co.

See on these points *supra*, 83 and 84.

But these and all other questions are not open for discussion in this Court, having been once fully considered and decided by it.

United States vs 422 *Casks of Wine*, 1 Pet., 547.
Wright vs Sill, 2 Bl., 544.
Minnesota Mining Company vs National Mining Company, 3 Wall., 332.

A writ of error does not operate as a *supersedeas*, unless a bond be given in a sum sufficient to secure the whole amount of the judgment in case of affirmance.

Catlett vs Brodie, 9 Wh. 553, overruling
Renner vs Bank, 2 Cr., C. C. 310.

A writ of error is not a *supersedeas* unless a copy be filed in the clerk's office for the opposite party within ten days.

Moore vs Dunlap, 1 Cr. C. C., 180.

See this point, *supra*, 25.

In regard to the

ESTOPPEL QUUSTICN AND TAX MATTER,

the Court will please note:

1st. That Mills county, instead of being silent, was speaking all the time.

The certificates issued in 1862.

The county instituted suit in 1863.

This suit it pressed to final judgment in the Supreme Court.

The county, during its pendency, was resisting the claim of the defendant in the most authoritative and emphatic manner and means in its power.

It did not tax these lands as the property of the railroad company. Such acts, with such intent on the part of the taxing agents, cannot be claimed to have been the acts of the county.

There is no proof that the railroad company paid any taxes for any years prior to that of 1870. See schedule "A" to Spalding's deposition, (abstract page 122).

But the taxing agents had not assessed these lands or placed them on the tax list. This was done at the instance, and by the immediate procurement of the agent of the railroad company. See testimony of D. M. Mitchell, (plaintiff's abstract page 195–6), in January or February 1871. The taxes for 1870 were paid on the 24th day of February, 1871, at the same time most likely that the agent had them placed upon the tax list. The amount paid for the tax of 1870 was $912.04. See Spalding's deposition, plaintiff's abstract, page 118.

In October, 1871, this question was submitted to the people, and they again spoke in thunder tones—voting the proposition down, with a majority of 674.

The only expressions of Mills county by authority, were the institution and prosecution of the suit to final decree, and this vote repudiating this proposition.

Now, it will be noted that during the year 1870 the railroad company had been selling off this trust property. See exhibit "G" to Spalding's deposition (abstract, 146–7).

The time sales prior to the payment of these taxes amounted in the aggregate to $5,321.72. They received invariably 6 per cent. down in cash, in advance.

Six per cent. on this amount is - -	$319 52
They made a cash sale to Buffington for - -	608 00
Sales at $1. 25 (*supra*, page 87,) - -	800 00
Total amount of receipts prior to payment of taxes for 1870, - - - -	$1727 52

At the time, then, of payment of the tax for the year 1870, the

company held in its hands the sum of $1727.52, nearly double the amount of taxes then paid by them.

And by the examination of the tables it will be found that the company had always in its hands, and in advance, more than the amount paid by them for taxes on this trust property.

The total amounts for all years so paid is but $4,125.36. See Spalding's deposition, abstract, 118.

The total amount of all receipts by them for all years to January 1, 1876, was $16,186.46 (*supra*, page 90).

Showing in their hands about four times as much trust money arising from sales of this property as they have paid to the county for taxes. This we tender back on settlement of general account and on final balance. (Plaintiff's abstract, 28).

The efforts made by the Board of Supervisors to have these lands stricken from the tax list, and determined resistance on the part of certain county officials to defeat them are seen by the testimony of Robbins, Whitfield and Barbour, and the resolution of the Board. (Plaintiff's abstract, 197, 198, 199, 200 and 201.)

The court will also note the persistent efforts of the defendants to force this estoppel upon the county by sending their agent Peet to the treasurer's office, and getting the new treasurer, Angell, to receive moneys on some of these lands. This was done while this case was being tried in the District Court room, up stairs, and just above the treasurer's office. A few tracts had got on the list by mistake, and Angell did not know they were swamp lands and Peet did not tell him. See Angell's evidence, page 202; also Peet's evidence, 179, plaintiff's abstract.

The persistent efforts of the defendants also to continue to pay and tender these taxes to the treasurer, and the technical advantages sought to be obtained by them in so doing, in order to place themselves in the way of being profited by this court's former decisions in the Adams County and Audubon County cases, can be seen by reference to the testimony of W. W. Peet (154-5-6 plaintiff's abstract), and that of C. W. Spalding (pages 117 and 118 plaintiff's abstract).

Many of the swamp lands were taxed prior to the year 1870, but not to the railroad company. There are no averments or proofs as to what tracts of lands were so taxed.

The county had the right to tax, and it was the duty of the proper officers to place upon the tax list all swamp lands that had been either sold or pre-empted under the various statute on the subject.

After enumerating the kinds of property that is not subject to taxation, the Revision of 1860, § 712, provides that—

"All other property, real or personal, within the State, is subject to taxation in the manner directed, *and this section is intended to embrace lands*, and lots in towns, including lands bought from the United States and from this State, and whether bought on credit or otherwise."

Under this statute thousands of acres of these lands were the proper subjects of taxation, having been sold or pre-empted, as is abundantly shown by admissions on all sides in this case.

In defendants' amendment to their answer, found on pages 63 and 64 of plaintiff's abstract, they claim to be the owners of the lands therein described by a further claim of tax deeds held in trust for them and claim title by virtue of those deeds, and that plaintiff's are estoppel by them and ask a decree quieting title.

Now, by reference to the testimony of Joel Solomon (plaintiff's abstract page 199) it will be seen that he as the agent of Orlando Meads sold to J. N. Dennison certificates of purchase at tax sales on the 28th day of October, 1867, and the sale was completed on that day. This was about one year prior to the compromise.

It will be found by a comparison of the descriptions contained in the list of lands so sold to Dennison and the descriptions of the lands contained in the five exhibits to said amendment, that each and every tract contained in said exhibits is to be found in the list so purchased from Meads through Joel Solomon.

The defendants were not, then, induced to buy in consequence of the compromise.

There is nothing in the averments or proofs to show that these lands were not subject to sale for taxes, on the grounds stated above.

Precisely what the rights of parties may be as based upon and in consequence of these tax deeds, there are no averments or proofs in the case to enable the Court to determine.

The averments in this amendment are out of place in this case, as in this case we are testing merely the validity of the compromise contract of 1868.

Certainly these tax deeds do not estop the county from denying the validity of this contract. This action is brought merely for the purpose of removing that particular cloud from plaintiff's right, whatever that may be, to the lands it contains and affects.

The plaintiff needs no further assurance of title than it has in the former decree.

The interest, if any, of the public in those lands was not subject to taxation. See Revision of 1860, § 711, and Code of 1873, § 707, art. 1.

Iowa R. R. Co. vs. Story County, 36 Iowa, 49.
Guthrie County vs Carroll County, 34 Iowa, 108.

It is the interest of private individuals alone in the lands at the dates of the assessment and levy that can be affected by the tax sale. Why, then, encumber the record and proceedings in this case with a subject that is foreign to the object, scope and aim of the case?

One word further before closing this argument. The sacred and stringent character of this property is discussed upon advanced grounds by the Supreme Court of California in the case of *Kimball vs Reclamation Fund Com.*, (1873) 45 Cal., 344.

In this interesting case it is held—

"1. That the object of the federal government in donating the swamp lands to the several States was to promote the speedy reclamation of the lands and thus invite to them population and settlement, thereby opening new fields for industry and increasing the general prosperity.

2. In accepting the grant of swamp lands the State of California was bound to carry out, in good faith, the objects for which it was made. The legislature has at all times (as has ours) recognized the binding force of this obligation.

3. A party claiming title to swamp lands under a patent from the State, which conveys a title without conditions, is deemed to have acquired his title with a full knowledge of the terms, conditions and purposes of the grant, and to have accepted the title in subordination to the paramount right and duty of the State to cause the land to be reclaimed.

4. He is presumed to have taken the title with the consent that the legislature might afterwards modify the system of reclamation, and that if the proceeds of the sale should prove to be insufficient to accomplish the reclamation, he would submit to the imposition of such burdens on the land to affect the object as the Legislature might deem expedient.

5. The Legislature may provide for dividing swamp lands into districts and having an estimate made of the cost of reclamation and for the issuing of bonds and sale of the same, to pay the expense of the reclamation and the levy of an assessment on the lands in the district to pay the same, *even after it has sold the land and given a patent* which does not contain any conditions."

According to this, *once* trust property, *always* trust property ! !

With the able arguments of my colleagues, Mr. Ross, and Mr. Lawrence, before me, I have purposely abstained from discussing as far as possible the topics so ably presented by both of them. The magnitude and importance of the subject is my apology for making so great a draw upon the time and patience of the Court, and we submit the case upon the three separate arguments.

D. H. SOLOMON,
of Counsel for Plaintiff.

We shall not enter upon a statement of the facts involved in this controversy, as they sufficiently appear in the argument of Mr. Solomon, to which the following remarks are intended as a mere addendum.

The statutes of Iowa in reference to swamp lands, sections 986, 987 and 988, revision of 1860, expressly provide that before any of the swamp lands granted to the State by congress shall be devoted by the different counties to the building of railways, the question shall be submitted, at some general or special election, to the people of the county.

It is further provided that where it is the desire of the county officers to devote the swamp lands to the building of a railway, or certain other purposes mentioned in the statute, a written contract shall be prepared between the county on the one side, and the person or company to whom the lands are to be conveyed upon the other, and it is also provided that "before such contract shall be of any force or validity, the same shall be published for four weeks immediately proceeding some general or special election in some newspaper published in the county, and if there be none published therein then three copies of the same shall be posted in three of the most public places in each township in the county for the length of time aforesaid, together with a proclamation of the proper officers, directing how and where the vote thereon shall be taken, and returns made and canvassed, and in what manner or form the people shall vote thereon; and if it shall appear that a majority of the people in any county voting thereon are in favor of the contract or proposition submitted to them, then and in that case such contract or proposition shall be binding upon the parties thereto, but if a majority of the people voting on such proposition are against the same, then it shall be null and void."

The lands in controversy in the present case were a part of the swamp lands situated in the county of Mills and State fo

Iowa, and granted by the State to the county subject to the limitations just stated.

In the fall of 1868 the Burlington & Missouri River Railroad Company submitted a written proposition to the Boad of Supervisors of Mills county for the conveyance of the land in controversy in this suit to the railroad company for railroad purposes.

There had been already litigation between the company and the county as to the ownership of these lands. The suit involving the title had been decided by the supreme court of the State of Iowa at its June term, A. D. 1867, in favor of the county. (See *Mills County* vs. *Burlington & Missouri R. R. Co.*, 22 Iowa, 91), and was pending at the time of the contract between the county and the railroad company in the supreme court of the United States, and on the 7th day of February, 1870, this court affirmed the decision of the supreme court of the State of Iowa. (See *Railroad Company* vs. *Freemont County*, 9 Wal., 89.

There is no question, then, but that the lands in controversy at the time when the contract was entered into between the county and the railroad company, belonged to the county as a part of the swamp land grant. We are met then, in this case, at the outset by the question, how *could* the county of Mills transfer the title to these lands to the Burlington & Missouri River Railroad Company in the face of the statute expressly forbidding the lands to be so transferred except upon the authority of a popular vote, in its favor, and that vote taken upon submission of the very contract proposed, by the county, to be made.

In the case under consideration, the contract between the railroad company and the county on the 31st of October, 1868, was never submitted to a popular vote, until after the deeds

were executed by the county to the company, but it was submitted by the authorities of the county in 1871, and voted down, 357 votes being cast in its favor, and 1,031 against it.

It seems to us that one of two views must be taken of this transaction. If the written proposition from the railroad company to the county and its acceptance by the county and the subsequent deed from the county to the company were intended as a complete and operative contract without submission to a popular vote, then the statutes were plainly violated, and the contract and deed must be considered in the language of the act as "null and void."

If, on the other hand, these instruments were designed by the parties before they took effect to be submitted to a popular vote, in accordance with the statute, then they are null and void, because they were submitted subsequently to such vote, and the vote was almost three to one against them. The only answer made or attempted to be made by the supreme court of the State of Iowa to this objection is, that the arrangement between the county and the railroad company was a compromise of litigation, and that a county has the power to compromise a law suit, as well as a natural person.

The case is reported in the 47 Iowa, 66.

While it is undoubtedly true that a county like a natural person has a general power to compromise litigation, it is certainly also true that a county cannot do what the statute expressly forbids, by giving to the transaction the name of a compromise. The county cannot accomplish by indirection what it is expressly forbidden to do directly. The county of Mills could not devote these lands to the construction of the railway, in the absence of a popular vote, simply because, in doing so, it also compromised a law suit. The powers of the county were not enlarged by litigation. Its contract to convey

was utterly void, because it was wholly *ultra vires*. The supreme court of Iowa seem to labor under the impression that because the lands in dispute, although really swamp lands, were *claimed* by the railroad company, therefore the county had the right to dispose of them without any reference to those limitations which the statute had expressly placed upon it in dealing with the swamp lands.

We find the following language in the opinion of the court :

"It appears to us that if the county had the power to make a compromise, and if the agreement in question was a compromise, the county cannot now be heard to say that the land was swamp land, and that the county could not for that reason make the agreement in question. As to whether the land was swamp land was the very question in issue. That is precisely what the parties agreed not to test in the court of ultimate resort. It is not, therefore, for us to say that the land was swamp land. The fact that it was so held by this court was not conclusive. The question was still an open one, and the agreement for a settlement made while the case was pending in the supreme court of the United States, was virtually an agreement that the question should remain an open one forever."

This certainly is very curious reasoning. It amounts to this, that although the land was swamp land, and belonged to the county and had been so decided by the supreme court of the State, and was so afterwards decided by the supreme court of the United States, yet nevertheless because the railroad company claimed the land, the county had the right to recognize the claim of the railroad company, and contract and convey the land to the company without any reference to the limitation upon its power which would have existed, admitting the land to be swamp land. Now, whatever title the county had acquired to the land, it had acquired by grant from the State,

and the State imposed upon the grant this condition, that the land thus granted should not be devoted by the county to railroad purposes, except upon a popular vote. But the county authorities say we doubt whether our title obtained from the State is a valid one, and therefore we will devote the land to railroad purposes without regarding the conditions upon which the title was granted to us by the State. But is it not evident that the same conditions were annexed to the grant, and the same limitations existed upon the power of the county, whether the county really held the land by a paramount title or not?

Its title, whatever it was, as we have already stated came from the State, subject to the condition, and it is extraordinary that it should be said the county was relieved of the condition because it had not acquired a perfect title from the State.

The conditions imposed by the State were conditions regulating and limiting the disposition of that title by the county. The legislature said to the county: "We grant you these lands, but you are expressly forbidden to devote them to railway uses, except by the vote of the people, and any such disposition made by you without the vote of the people shall be null and void."

The county replies: "You have not given us a good title, and therefore we are not bound by the conditions you have named, and we will devote these lands to the construction of the railroad without submitting the question to the vote of the people."

It seems to us that this reasoning of the supreme court of Iowa, while we would speak of it with entire respect, is singularly illogical and erroneous. The result of it, of course, would be, that while the State was most solicitous to prevent the lands granted to its various counties, amounting to a vast number of acres, and of great value, from being given away to railroad companies, nevertheless that precise object could be attained by

having a railroad company in every county set up a claim to the land, however baseless it might be, and then have the county officers convey to the railroad company the title of the county, and defend their action in the courts by calling it a compromise.

We cannot change the substance of a transaction by giving it a new name. In this case, the county owning the swamp lands, has disposed of them, and for a forbidden purpose. Its officers have conveyed them to the railroad company substantially without consideration, and in express violation of law. The county now comes forward, and files its bill to set aside that conveyance upon the ground that the officers who made it were faithless to their trust, and acting beyond the express limitations of their power, and the supreme court of Iowa tells us that their action must be sustained because they were making a compromise. We cannot but wonder whether it is really the opinion of that learned court that any course which the authorities of a county think proper to adopt, even when such course is in direct violation of the statute, must be sustained because the authorities in thus acting have compromised a law suit. The position seems to us very extraordinary. The case is not complicated by any question of innocent purchasers, or outside equities. Both parties, the railroad company and the county, knew the law. The county claimed these lands as swamp lands under the statute, and this title had been established by the highest tribunal of the State. It had sold a considerable portion of the land to innocent purchasers, and by this arrangement the entire track was conveyed to the railroad company, the company and the county both knowing that the transaction would be utterly invalid, unless ratified by a vote of the people. This provision of the law entered into the contract between the parties, and was a part of it. In pursuance of this provision the transaction was submitted to a vote of the people, and voted down, and still the supreme court of Iowa held that because this transac-

tion was called a compromise of a law suit, it must be sustained. The theory of that court seems to be that whatever is done in the way of compromising conflicting claims must be sustained because the contending parties have agreed to such a settlement; but if one of the parties is a municipal corporation, acting through agents with delegated and limited powers, the most important question still remains whether the compromise was of such a character that the officers of the county had the power to make it.

If these county officers had conveyed these lands to the railroald company without a popular vote in the absence of a law suit, it would not be pretended that such a conveyance was valid, and yet how could it acquire any validity from the mere fact that the railroad company was setting up a claim to the lands. The supreme court speaks of the railroad company as forbearing to urge its writ of error in the supreme court of the United States in consequence of the compromise, but this is a mistake. The proof shows that the case was submitted to the court upon printed arguments upon both sides, and decided by the court in favor of the county. The case reported in 9 Wal., is the case of Freemont county, which presented the same question as the Mills county case, and the affirmance of the decision of the supreme court of the State in the Mills county case occurred at the same time as shown by the proof.

We make the following extracts from opinions pronounced by the supreme court of the State of Iowa, in regard to the powers of county officers in that State. In the case of *Hall* vs. *County of Marshall*, 12 Iowa, 154, we find the following language: "A county is a political sub-division of the State, invested with certain limited and specified powers, which are divided among, and are to be exercised by, a class of agents or county officers, appointed for that purpose. Their duties are not only defined, but the mode of performing them is in many instances prescrib-

ed by law; especially those which relate to the fiscal operations of the county, and the raising of money by taxation. When this is done, it is a well settled maxim that the power must be exercised precisely as it is given. Indeed it is a general rule, that where the statutes confer special ministerial authority, the exercise of which may affect the rights of property, or incur a municipal liability, it shall be strictly construed and as strictly observed and that any departure will vitiate the whole proceeding."

In the case of *Webster County* vs. *Taylor*, 19 Iowa, 122, the court speaks as follows: "The sad experience of this State has shown the necessity of confining political and municipal corporations within their prescribed limits; the public safety is intimately bound up with a strict adherence to this rule."

In the case of *Richard* vs. *Warren County*, 31 Iowa, 388, we find the following language in the opinion of the court: "The board of supervisors are agents of the county, whose powers are defined and limited by the act creating them. Beyond the powers conferred upon them by the statute, these acts no more bind the county than do those of a special agent, when he transcends the purposes of his agency, bind his principal."

The supreme court in this case has not only sustained the title to the land claimed by the railroad company, in express controvention of the statutes, but it has also held that the company upon its cross bill is entitled to recover from the county the sum of ten thousand dollars and interest in payment of lands which the county had sold prior to the bargain made with the company. The correctness of this decree depends, of course, upon the same consideration which affect the validity of the other, and in regard to them both we have only this further to say that inasmuch as they sustained a transaction entered into by county officers in direct violation of the statute

and resulting in taking from the county a vast mass of property for a purpose prohibited by law except upon a popular vote, which, when taken was almost three-fourths against such proposition, when we consider these matters, it seems to us impossible that the decision of the State court shall be sustained.

The lands in controversy *were* swamp lands as decided by this court. They *have become* railroad lands, if the decision of the supreme court of the State in this case is allowed to stand. But the statute says swamp lands shall not be diverted to railroad purposes except by the popular vote. Yet there has been no vote except one which was against the transfer.

What has become of the force of the statute?

II.

WE NOW COME TO THE QUESTION OF ESTOPPEL. THAT IS CLAIMED TO ARISE FROM THE MAKING OF THE DEEDS BY THE SUPERVISORS, AND THE RECEIPT OF TAXES BY THE COUNTY.

It is difficult to discover the force of this position. We are at a loss to comprehend how a county is to be estopped by a deed which the statute forbids it to make, or how its deed, which is void from an entire want of power to make it, is to be validated by its own subsequent act. If this can be done, then a corporation can extend its power to any degree by first doing a void act, and then doing something else to ratify it. Admitting, as it must be admitted, that the county could not divest itself of its title by a conveyance under seal, without the authority of a popular vote, can it do so by assessing a tax on the land, and allowing the grantee in the void deed to pay it?

There is nothing that will more effectually estop a person or corporation than its deed, and if that is ineffectual for such pur-

pose, it is not easy to see how any other act would pass the title.

The defense of estoppel, raised in this case, proceeds upon an entire misapprehension, we respectfully submit, of the law of estoppel.

A person or corporation having the *power* to do a particular thing, may be estopped by matter *in pais* from saying they have not done it; but a person or corporation *not having the power* to do the act directly, we submit, can not do it by indirection. If the statute says a county shall not do a particular thing, the county cannot do it, no matter what method it may adopt.

For many purposes, and in many cases, we freely admit the law of estoppel applies to private corporations, but it is never applied to municipal corporations for the purpose of holding that they have made a valid disposition of their property, when they have disposed of it in a manner forbidden by the law that created them.

The same rule applies as in the case of natural persons under disabilities, like infants and married women. They cannot convey their lands, and they cannot be estopped from saying they have not conveyed them.

But, although the doctrine of estoppel is sometimes applied, for some purposes, to private corporations, we think we can safely say that it is never applied to municipal corporations for the purpose of validating acts which the law does not authorize them to perform.

The supreme court of the United States has gone a great length in holding towns and counties liable for the payment of bonds irregularly issued, where there has been a power to issue

them. But that court has always held, even in regard to negotiable paper, that it is void, even in the hands of innocent holders, where there has been an entire want of power to issue it. The latest case in that court on that subject is *The Mayor* vs. *Ray*, 19 Wallace, 469.

In that case, four of the judges who concurred in the decision, placed the case on the broad ground stated in the syllabus, as follows:

"1. That municipal corporations have not the power, without legislative authority expressly or clearly implied, to borrow money, or to issue notes, bills, or other securities of a commercial character, free from equitable defenses in the hands of *bona fide* holders.

"2. That such corporations are of a public character, instituted for purposes of local government, and constitute part of the domestic government of the State; that the power of taxation is given to them for the purpose of raising the means of carrying on their functions, and that the creation of such special power is exclusive of others.

"3. That the officers of such a corporation cannot, like the officers of a private corporation, create, by their acts, an estoppel against the corporation, its tax payers, or people, so as to render illegal issues of ordinary city drafts or vouchers (not authorized by law) valid in the hands of holders for value; that such holders are affected with notice of the illegality."

The case of *Marsh* vs. *Fulton County*, 10 Wallace, 682, is strictly analogous to this.

In that case Fulton county had, without legal authority, issued certain railway bonds which had gone into the hands of innocent purchasers. Subsequently the county paid the interest,

and also paid some of the bonds. It was contended in the supreme court that if the original issue was unlawful, it had been subsequently ratified—in other words, that the county was estopped as to innocent holders from setting up the original invalidity of the bonds. This is what the court says:

"It is also contended that if the bonds in suit were issued "without authority, their issue was subsequently ratified, and "various acts of the supervisors of the county are cited in support "of the supposed ratification. These acts fall very far short of "showing any attempted ratification even by the supervisors. "But the answer to them all is, that the power of ratification "did not lie with the supervisors. A ratification is, in its effect "upon the act of an agent, equivalent to the possession by him "of a previous authority. It operates upon the act ratified in "the same manner as though the authority of the agent to do "the act existed originally. It follows that a ratification "can only be made when the party ratifying possesses the "power to perform the act ratified. The supervisors possessed "no authority to make the subscription or issue the bonds in "the first instance without the previous sanction of the qualified "voters of the county. The supervisors in that particular were "the mere agents of the county. They could not, therefore, "ratify a subscription without a vote of the county, because "they could not make a subscription in the first instance with-"out such authorization. It would be absurd to say that they "could, without such vote, by simple expressions of approval, "or in some other indirect way, give validity to acts, when "they were directly in terms prohibited by statute for doing "those acts until after such vote was had. That would be "equivalent to saying that an agent, not having the power to "do a particular act for his principal, could give validity to such "act by its indirect recognition.

"We do not mean to intimate that liabilities may not be in-

"curred by counties independent of the statute. Undoubtedly "they may be. The obligation to do justice rests upon all per- "sons, natural and artificial; and if a county obtains the money "or property of others without authority, the law, independent "of any statute, will compel restitution or compensation. But "this is a very different thing from enforcing an obligation "attempted to be created in one way, when the statute declares "that it shall only be created in another and different way."

We also quote the following from section 381 of Dillon on Munic. Corporations:

"The general principle of law is settled, beyond controversy, "that the agents, officers, or even city council of a municipal "corporation, *cannot bind the corporation* by any contract which "is beyond the scope of its powers, or entirely foreign to the "purposes of the corporation, or which (not being in terms "authorized) is against public policy. This doctrine grows out "of the nature of such institutions, and rests upon reasonable "and solid grounds. The inhabitants are the corporators—the "officers are but the public agents of the corporation. The "duties and the powers of the officers or public agents of the "corporation are prescribed by statute or charter, which all "persons not only may know, but are bound to know. The "opposite doctrine would be fraught with such danger, and "accompanied with such abuse, that it would soon end in the "ruin of municipalities, or be legislatively overthrown. These "considerations vindicate both the reasonableness and necessity "of the rule, that the corporation is bound only when its agents "or officers, by whom it can alone act, if it acts at all, keep "within the limits of the chartered authority of the corporation. "The history of the workings of municipal bodies has demon- "strated the salutary nature of this principle, and that it is the "part of true wisdom to keep the corporate wings clipped "down to the lawful standard."

And from Vol. 2, Sec. 767 of the same author, we quote the following :

"The principle that a muuicipal corporation is bound by the "acts of its officers, only when within the charter or scope of "their powers, and that acts outside of the powers of the corpo- "rations, or of the officers appointed to act for it, are void as "respects the corporation, is vital; and the opposite doctrine "has no support in reason, and very little, if any, in the judg- ments of the courts."

We make the following extract from the opinion of the supreme court of Connecticut, in *Hood* vs. *R. R. Co.*, 22 Conn., 508 :

"It is found that the defendants had no power to enter into "the undertaking in question, and therefore, as a ground of "claim, it must be agreed, the undertaking merely is of no "avail, for the reason that the directors, having no authority, "did not, in legal estimation, make the contract for the "company. The question is, are the defendants estopped "setting up this in their defence? The statement of the case "carries on its very face conviction to the mind, that it can not "be so. The defendants estopped from denying that they "have done what they never could have done ! It is a question "of power under the charter; and however individuals may be "liable and estopped, who untruly hold themselves out as "clothed with power, the defendants cannot be estopped on "any such principle of law known to the court. The notion of "an estoppel *in pais*, to which class, if any, this estoppel "belongs, proceeds on the idea of acquiescence or consent, a "consent expressly or impliedly given by the party claimed to "be estopped. Of course, there must be a legal possibility, or "there can be no real or supposed acquiescence and consent, "and where consent may be given, silence may be sufficient "proof that it is given; and so, a course of known action may

"be sufficient proof, for the law requires no exact form. But "as we say, it does require a legal possibility, and where "there is none, courts cannot consistenty hold, there is an "estoppel."

* * * * * * * *

"If this is not so, there are no restrictions or limitations on "chartered companies, and they may do anything and every- "thing the directors please, which is not absolutely unlawful. "The exercise of power is held to prove itself, which is "absurd."

In the case of *Ropire* vs. *City of Boston*, 4 Allen, 58, the supreme court of Massachusetts held that "a city is not estop- "ped from claiming land which it owns by the wrongful act of "its assessors in taxing it to a person who had no title to or "possession of the same, or by the collector's sale for the non-payment of such tax."

The foregoing is the reporter's syllabus of the case.

The same rule was applied in this State, in the case of *Gilson* vs. *Howe*, 37 Iowa, 169.

The subject of estoppel *in pais* of a municipal corporation, was very fully and ably examined by the supreme court of California, in the case of *McCracken* vs. *City*, 16 California, 591. In that case, as in the present, the city had sold land belonging to it in a manner different from that prescribed by the charter, and had subsequently done various things which were relied upon as an estoppel.

The court decided there was no estoppel, and made use of the following language:

"The subject of estoppel was fully considered in the case of

"*Biddle Boggs* vs. *Merced Mining Co.*, 14 Cal., 279. We "there held that to conclude a party, by his declaration or con- "duct, from asserting a title to property against another, it "must appear, 'first, that the party making the admission, by "'his declarations or conduct, was apprised of the true state "'of his own title; second, that he made the admission with the "'express intention to deceive, or with such careless and cul- "'pable negligence as to amount to constructive fraud; third, "'that the other party was not only destitute of all knowledge "'of the true state of the title, but of the means of acquiring "'such knowledge; and, fourth, that he relied directly upon "'such admission, and will be injured by allowing its truth to "'be disproved.'"

* * * * * * * *

"If the common council could set up an acquiescence in "their own wrongful acts as a defense to the assertion of rights, "consequent upon a reliance upon such acts, the limits imposed "by the charter upon the exercise of their powers would be "useless."

The total inability of a county to accomplish, either directly or indirectly, what the statute forbids, is nowhere more clearly expressed than in the following quotation, from the opinion in *Clark* vs. *Des Moines*, 19 Iowa, 199.

"Counties are civil and political organizations, with a few "defined and limited powers. They are simply governmental "auxiliaries and agencies, and their powers are much more lim- "ited than municipal corporations, strictly so-called, and more "restricted than trading or private corporations.

"The county is not bound by the unauthorized act of the "county judge, or other county officers, with respect to a mat- "ter wholly beyond the corporate powers and duties. The

"written statute law is the source and charter of its power; "beyond this it cannot go. If it undertakes, through its "officials, to do so, the county—*the people of the county*—are "not bound. Hence the county is not estopped, although the "warrant issued, from making the defence of *ultra vires*."

The necessary limitations upon the application of the doctrine of estoppel are well defined by the supreme court of Massachusetts, in the case of *Lowell* vs. *Daniels*, 2 Gray, 169, in the following language:

"This doctrine of estoppel *in pais*, would seem to be stated "broadly enough, when it is said that such estoppel is as effect- "ual as the deed of the party. To say that one may, by acts "in the county, by admission, by concealment, or by silence, in "effect do what could not be done by deed, would be practically "to dispense with the limitations the law has imposed upon the "capacity of infants or married women to alienate their estates.

* * * * * * * *

"No case at law has been cited, nor have we found one in "which it has been held, that the estate of a party has been "barred by estoppel *in pais*, who was incapable of conveying "by deed.

"And though courts of law have liberally applied the doc- "trine of estoppel *in pais*, to cases of personal property, in the "transfer of which no technical formalities intervene to prevent "its application, we know of no case in which it has been ap- "plied to a party incapable in law of making a contract."

The application of this principle, which seems perfectly indisputable, would settle the case at bar. The deed of the county passed no title, because made in violation of the statute, and as said in the above case, no estoppel *in pais* can have a greater effect than the deed of the party sought to be estopped.

In *Gidden* v. *Strapla*, 52 Pa. State 405, the court use the following language, to the same purport as that above quoted:

"Acquiescence in, or acknowledgment of the invalid act, can-
"not be invested with greater virtue or vigor than the deed
"itself by which the act was done. The policy of the law
"which denies the capacity to do the act, as clearly denies the
"capacity to confirm it, except in the legal mode.

* * * "If, through the administration of equity we
"can produce a result which the law denies *ab initio*, on grounds
"of public policy, then estoppel or compensation, its equitable
"equivalent, will accomplish what the law and policy have for-
"bidden. But we have seen that in such a case equity does
"not overturn, but follows the law."

We might add indefinitely to these authorities, but it must be unnecessary. The law is clear and settled.

We suppose counsel on the other side will cite the case of *Adams County* vs. *B. & M. R. R. R.*, 39 Iowa, 507.

That was a very different case from the one before the court.

As we understand the report, that was not a contest as to whether the swamp land grant, or railroad grant, conferred the paramount title. That question had been settled long before. The contest was as to whether the lands in controversy were in fact swamp lands or not. They had been certified by the department at Washington to the railroad company. The county claimed them as swamp lands. The company insisted that they were not swamp lands.

For a considerable number of years prior to the controversy, the county had been taxing the lands as the property of the railroad company, and after some dispute in regard to the

matter, had received, at one time, ten thousand dollars from the company. The county at that time made no claim to the land. She was silent, as the court says, when she ought to have spoken. There was no offer of the county to refund the taxes. The title had never been established in the county. On the contrary, it was, *prima facie*, in the company. Under these circumstances the court thought the county was too late in undertaking to raise the question as to whether these were swamp lands or not.

In the case now before the court there was never any question as to whether the lands were in fact swamp lands. The question was, which grant was paramount. The taxes that were paid upon the land were paid while the litigation was pending. The company was not misled. It knew the county was claiming the lands, for the litigation had long been pending, and had been finally decided by the supreme court in favor of the county. It could not be said, as was said in the other case, that the county was silent when it should have spoken, for it had been speaking all the time. So far as taxes were paid after the alleged compromise, the company paid them in its own wrong. It knew it had acquired no title by the compromise, and that the agents of the county could no more divest the title of the county by collecting a tax from the company than they could by making a deed without the authority of a popular vote. The case is not nearly as strong in favor of an estoppel as the cases above cited from 4th Allen and 37 Iowa.

Unless this Adams county case can be distinguished from the case at bar, in the manner we have indicated, then we respectfully submit it should be overruled.

The position that the tax assessor and collector of a county can deprive such county of its title to its land, and vest it in a railroad company, by merely assessing the land in its name, and

receiving the taxes from the company, when a *deed* of the land to the company, executed by the proper authorities of the county, would be ineffectual for conveying the land unless approved by a vote of the people of the county, seems so illogical and even monstrous a proposition, that we cannot believe the supreme court of Iowa will pronounce such a decision, or sanction such a construction of any of its former judgments.

But, in fact, the railroad company, in the present case, has not even this weak foundation to rest upon, when it urges the doctrine of estoppel.

It appears from the testimony of D. M. Mitchell, page 195 of the printed abstract, that the first taxes which were paid on these lands were the taxes of 1870, payable in 1871, and that they were not then put on the tax list by the proper authorities of the county, but placed there *at the suggestion of the Railway Company itself*, after the books had gone into the hands of the treasurer. The railway company, instead of being required to pay taxes on these lands, was *seeking* to pay them. It was, apparently, planning an estoppel for the county. It is not pretended that payment of these taxes was ever enforced against the railway company, or ever would have been, if it had not voluntarily paid them.

The lands, after having been placed in the tax lists in the winter of 1870-71, at the suggestion of the railway company, as already stated, were copied into the books of the two succeeding years. The witness testifies that, "in preparing books "for the township assessors for the subsequent years, we ob- "tained descriptions and owners' names from the former tax "books and transfer books." (Page 195.) But in 1874 the notice of the board of supervisors was called to this matter, and in September of that year the board passed an order directing that no taxes be collected on these lands. (Pages 196-7-8 of printed abstract.)

In the face of these facts, the pretense that the company acquired title to these lands through an estoppel upon the county, arising from the payment of taxes, is simply absurd, even if the county could lose its title, under any circumstances, by process of estoppel, which we of course deny. The railroad company procured the lands to be placed on the tax list in order that it might pay taxes on them, and now charges that the act estops the county!

An estoppel *in pais* always proceeds on the ground of actual or constructive fraud, based on misrepresentation or concealment, with a resulting injury if the estoppel is not enforced. Here there has been neither misrepresentation nor concealment, Neither can there be any injury, for the county offers to refund the taxes. In that way full justice can be done to all parties. If the pretended estoppel is enforced, the county loses its lands in violation of the statutes of the State, and without consideration.

C. B. LAWRENCE,

Of Counsel for Mills County.

From this on to the end use Abstract in 192.

The following argument is also submitted by the undersigned attorneys for Mills county. It was prepared by Hon. L. W. Ross, and used in the court below. The topics are:

1. The lands in suit being swamp lands, was it competent for Mills county to make the contract and deeds assailed in this action?

2. Under the statutes and the facts and circumstances of the case, can the B. & M. R. R. Co. and its grantees be regarded as *bona fide* purchasers, without notice of the lands in controversy?

3. Can the five deeds in controversy be regarded as the deeds of the county?

4. The defense interposed suggests that the real question is not one of power to devote swamp land to the making of a railroad, but rather of the settlement of a law suit involving swamp land.

5. Under the particular facts and circumstances of this case, is the plaintiff estopped from recovering the lands in controversy?

6. There was error in the ruling of the court in permitting the question (abs. 251), to witness Angell and in receiving in evidence his answer thereto.

7. There was error in the ruling of the court in permitting

the question (abs. 261), to witness Wing, and in receiving in evidence his answer thereto.

8. Errors committed by the court as indicated in assignments 6 to 12 inclusive. (Abs. 261–2).

9. Error committed by the court in not ruling as indicated in assignment 13.

1st. The lands in suit being swamp lands, was it competent for Mills County to make the contract and deeds assailed in this action?

The swamp land grant was not an unqualified gift, but rather a grant in trust, to enable the State to reclaim the lands and fit them for cultivation. So also the grant by the State to the counties was for the purpose of securing the reclamation contemplated by the act of Congress. This is the letter and spirit of the entire Federal and State legislation on the subject. The State in accepting the grant took upon itself the obligation of making the necessary drains and levees, and this obligation was cast upon the counties as a condition of the grant to the counties.

Montgomery County vs. *B. & M. R. R. Co., Supra.*

1. Originally the control of the swamp lands was given to the county courts. The act creating a board of supervisors was intended to supercede the jurisdiction of the county court. To render this intention clear, Chap. 8, Laws of 1861, was passed, giving the board control of the swamp lands, under the laws then existing.

2. The record shows that the contract between the board and the railroad company was made in 1868, that the four deeds were delivered and recorded in 1869, 1870 and 1871. Now during these years Chap. 77 of the Laws of 1862, and sections 987 to 990 Rev. of 1860 Laws of Iowa, were in force. These statutes declare that the counties, when authorized by a majority vote of the people, may devote the swamp lands for the making of railroads through the county where the lands are situated. These statutes further provide that when such proposition or contract is not approved by such majority vote, then that it shall be null and void.

The true meaning and intent of these statutes is that the county through its board of supervisors and railroad company may propose to devote the swamp land for the making of railroads, but that until such proposition is approved by a vote of the people of the county it is incohate and incapable of binding any one; and a fair conclusion from all this is, that without such approval no such devotion can be legally made .

Grimes vs. *Hamilton County, Supra.*

These statutes relating to the swamp lands, and the limited control of the board of supervisors over the same, imparted to the B. & M. R. R. Co., and to all persons claiming under it, notice that the contract and deeds were in contravention of law.

The contract itself provided for the conveyance of swamp lands—"all the swamp lands of the county"—and the deeds all refer to this contract in terms sufficiently plain to put the B. & M. R. R. Co., and all persons claiming under it, upon inquiry as to what said contract was, and as to what the authority of the county was to devote the lands to the making of railoads. Such inquiry would necessarily have called out the fact that the

proposition to devote the lands to the making of a railroad was not submitted to a vote of the people until after the first deeds in controversy were delivered and recorded.

3. The testimony shows that the last deed was signed by two members of the board on the 19th of June, 1871. The third member of the board refused to sign this deed, alleging as grounds the want of authority in the board to convey. (Abstract, 263).

On the same day, at the instance of Mr. Watkins, the attorney for the railroad company, steps were taken by the board for the submission of the proposition to a vote of the people (abstract 92). The vote was taken at the regular October election, when the contract was repudiated by an overwhelming vote. By some fortuity the record of this election is a little "crooked." Taken as a whole, it is very repugnant. It contains enough to show that the vote was *against* ratifying the proposition or contract. The actual result and the error in the record are clearly stated by D. M. Mitchell (abstract, 149), D. M. Whitfield (abstract, 150), B. F. Buffington (abstract, 246), and Bennett Creech (abstract, 247)—the first named being the auditor and the three last being the members of the board who canvassed the vote and signed the record. Thus it appears that the people of the county had no opportunity to approve or disapprove until after the wrong was well nigh consumated, and when at length their approval or ratification was asked, they gave a most significant negative to the whole business. These considerations, we think, conclusively show that it was not competent for Mills county to make the contract and deeds assailed in this action.

2d. Under the statutes and the facts and circumstances of the case, can the B. & M. R. R. Co. and its grantees be regarded as bona fida purchasers, without notice, of the lands in controversy?

1. The lands in controvesy are swamp lands. It was only competent for the county to deal with them as swamp lands. The statutes, Federal and State, imparted notice to the B. & M. R. R. Co. of their contents, of the trust character of the lands, and of the power of the county and county boards of supervisors over the same. We now call attention to the subject and terms of the contract. The subject was swamp lands. It proposed to devote all the swamp lands held by the county. Its plain recitals invited an inquiry as to the power of the board of supervisors to make it. It asked for a construction of the statutes, State and Federal, relating to these lands, and what disposition could lawfully be made of them. It warned the B. & M. R. R. Co. that without the authority of a vote of the people it was wholly void.

Notwithstanding these notices and warnings, the railroad company, pursuing its seeming advantage, took the five deeds in controversy. But those deed are all quit claim deeds, hence they furnished no protection to the grantee or its assigns. It is now well settled in this state and country that one holding under such a deed cannot be regarded as a bona fida purchaser without notice. (Watson vs. Phelps, 40 Iowa, 482, and cases cited). The principal of these causes is, that the grantee only takes such title or interest as the person making the deed could lawfully convey. If the grantor has nothing, it will be impossible for the grantee to receive anything. (May vs. Le Clair, 11 Wall., 232). It cannot be claimed that the persons making these quit claim deeds had either title or interest in the lands therein described. The county, as we have already seen, had

a limited control over the lands, and had authority, under certain conditions, to convey the same. But in making these deeds the conditions referred to were not present. There was no authorization by the people, and in the absence of this authority there was nothing either in the persons making the deeds, or in the county, or in the board of supervisors of the county, which could become the subject of a conveyance to the railroad company.

2. This view of the case wholly disposes of the bona fides of the B. & M. R. R. Co., and much that has been said respecting this company, and the notice imparted to it is applicable to the claim of the C., B. & Q. R. R. Co. Whilst the latter company claims to have acquired the interest of the former company, still there is no sufficient evidence of such transfer furnished by the record. There is no deed in evidence from the B. & M. R. R. Co. to the C., B. & Q. R. R. Co. The lease (abstract 121) looked to further conveyances. If such further conveyances had been made, it is but reasonable to suppose that the defendants would have offered the same in evidence. The absence of such deeds suggests either that they do not exist, or else that they are coupled with facts and circustances which would prejudice the defendants if offered in evidence.

Sec. 2842, Revision of 1860, declares that "when a petition has been filed respecting real estate, the action is pending so as to charge third persons with notice of its pendancy, and while pending no interest can be acquired by third persons in the subject matter thereof as against plaintiff's title." The petition in this case was filed on the 20th of January, 1874, and from that time imparted notice to all of the defendants of plaintiff's title therein. The testimony further shows that the directory of the consolidated or new C., B. & Q. R. R. Co. was made up from the boards of the old companies (abstract, 179).

From this it would seem that the pretended transfer of lands in controvery to the C., B. & Q. R. R. Co. was a name rather than a reality. Mr. Walker (abstract, 232) says that he drew the lease between the old railroad companies, and executed it on the part of the C., B. & Q. R. R. Co. This instrument, among other things, provides for a transfer of all the lands before that time granted by the general government to the B. & M. Co., and then remaining unsold, amounting to about 200,000 acres. Mr. Walker says that at that time he supposed and believed that the lands now in controversy constituted a part of the grant of May 15, 1856, made to the State of Iowa, and by the State of Iowa passed to the B. & M. R. R. Co. The fact that Mr. Walker supposed that these lands belonged to the railroad grant can cut no possible figure in this case. He had the most complete constructive notice that they belonged to the Swamp Land Grant. If he negotiated for them as railroad lands he should blame no one but himself. The county was not a party to the lease, and is in no sense blamable for the act of Mr. Walker or of his company.

3. As intimated in the preliminary statement, the defendants Brooks, Hardy and Griswold, do not disclose, either by answer or by testimony, the character and extent of their interest in the controversy. In the absence of these things, it is difficult to understand how the decree of the court below can properly be in their favor. They are absolutely without standing or merits in the case.

4. The defendants, Samuel Masters and others (abstract, 98), were made parties with a view of bringing all persons supposed to have an interest in the lands before the court. Some of these persons appeared and answered, but the great number failed to appear and were defaulted. From the answers filed

it would seem that these parties claim under and through the B. & M. R. R. Co. They offered no testimony, however, in support of such claim. Very many of them acquired their suposed interests after the commencement of this action, and hence come under the provisions of Sec. 2840 above cited.

3d. Can the five deeds in controversy be regarded as the deeds of the County?

1. Dillon on Municipal Corporations, Sec. 9*a*, says that a corporation is a legal person, with a special name, and composed of such members and endowed with such powers, and such only, as the law prescribes. In *Hamilton County* vs. *Mighels*, 7 Ohio, St. 109, the court says: Counties are, at most, but local organizations, which, for the purposes of civil administration, are invested with but few functions characteristic of a corporate existence. They are local sub-divisions of the State, and, with scarcely any exceptions, their powers and functions have reference to the policy of the State. Now the lands described in the deeds in controversy are *trust lands*, first granted to the State and afterwards by the State passed to the counties, and placed under the control of the board of supervisors of the several counties.

The powers of the counties and of their Boards in the premises, are expressed and measured by the Statute. The mode of administering this trust is particularly pointed out. If the powers thus granted were exercised, and the mode of administering the *trust* was followed, in the making of the deeds, then they are valid, but if not they are void. In support of the view that the lands in suit are *Trust Lands*, see Montgomery County vs. B. & M. R. R. Co., 38 Iowa, p. 210; and in support of the view that a vote of the people is necessary to validate a contract

for the devotion of lands to the making of railroads, see Grimes vs. Hamilton County, 27 Iowa, p. 297.

2. The deeds in controversy do not purport to be the acts of the County through its Board, but rather the acts of the persons signing the same. These persons may have been members of the Board at the time, but we submit that their acts are not the acts of the Board, and that such acts are in themselves of no validity as against the County. Corporations do not ordinarily act in that way. Three of the deeds have no seal affixed. The general rule is that conveyances of real estate by corporations should be executed in the corporate name and under the corporate seal. Dillon on Municipal corporations, Sec. 450. Sec. 221, Rev. 1860, declares that each County shall keep a seal, such as is provided by law. Sec. 222 provides what the inscription shall be, and declares it to be the seal of the County Court.

By the act of 1853, granting the swamp lands to the Counties they were placed under the care and superintendence of the County Court, and in case of sale thereof, it was made the duty of the County Court to execute to the purchaser a deed in fee simple, signed in the official capacity of said Court, countersigned by the Clerk of said Court, and sealed with the official seal thereof. By the provisions of Chap. 8, Laws of 1861, the administration of the swamp land was conferred upon the Board of Supervisors. The transfer of this jurisdiction did not have the effect to repeal Sec. 11 of the Act of 1853 above cited. The Act creating the Board of Supervisors was intended to supercede the old County Court system, in respect to the management of the property and business of the County. By the Act which took effect April 2, 1860, it was provided that existing laws should be amended by inserting therein *County*

Board of Supervisors, in lieu of "County Judge." Next followed the legislation of 1861, above cited, expressly committing the control of the swamp lands to the Board, thus leaving all of Sec. 11, Act of 1853, relating to conveyances, practically in force except that the words *County Court* were stricken out, and *County Board of Supervisors* substituted.

3. Thus it appears that none of the deeds are executed in the corporate name, and that three of them lack the corporate seal There is still another aspect of the case which strengthens the view that these deeds are not the deeds of the County. They are without consideration, and were obtained by the practice of fraud.

The railroad grant of 1856 to the State, and by the State to the B. & M. R. R. Co., was accepted by the latter in September, 1855 (Abstract, 157.) On the 24th of March, 1857, the B. & M. R. R. Co. adopted a map showing the location of the route of the road, as definitely fixed. This route passed centrally through Mills county via Glenwood to a point on the Missouri River near the mouth of the Platte River. A certificate showing the above with other facts, was attached to said map, and the whole filed in the office of the Secretary of State, on the 28th of March, 1857. Up to this time the grant had been a *float*, but by the acceptance of the grant (Abstract, 153) and the filing of the plat and certificate (Abstract, 154) the grant was *anchored*, and the obligation of the company to build its road on this route became *fixed*. The testimony shows that in the spring of 1868 the company had built its road along this route to a point near Red Oak, in Montgomery county, and had received from time to time installments of the lands granted under the legislation above referred to. The grant was intended to secure an *entire* road between Burlington and a point on

the Missouri River near the mouth of the Platte River. In this respect the grant was an *entirety*; so also the obligation of the Railroad company was an *entirety*—it was an undertaking to build the entire road, and on the route definitely located and fixed, as shown by the map and certificate adopted and filed in March, 1857. The testimony further shows most conclusively that in the spring and summer of 1868 the Railroad company commenced running new lines of survey, on each side of the located route. One of these was from Red Oak to Council Bluffs, and the other considerably south of the located route. These lines were run ostensibly for the purpose of finding some other route than the located line. They were run under the direction of the company. They had the effect of *scare lines*, and led the people of Mills county to fear that the company intended to abandon its located route, and so deprive them of the road. Without marshaling the testimony on this point in this place, we affirm that it shows the existence of general apprehension and alarm, that the county would be deprived of the road. The members of the board of supervisors partook of this feeling. Every witness introduced testifies to the fact of alarm and its cause, The company ran new lines. Its officers and agents talked about the advantages of a route other than the original route. They were cognizant of the alarm thereby occasioned. "By ways that were dark, and by tricks that were vain," they brought about the proposition of July 13, 1868, and its approval of Nov., 1868. That proposition, in its composition and its subject matter, has no parallel in the English language, except, possibly, in Mr. Tilden's letter of acceptance. Its authorship is attributed to Mr. Hale, and its history is substantially as follows: At the June session, 1868, of the board, on motion of Mr. Wing, Wm. Hale, E. C. Bosbyshell, L. W. Tubbs, D. H. Solomon, and S. Christy, were appointed a committee to confer and *treat* with the B. & M. R. R. Co. with a view to settling points in controversy between the said company

and the county (Abstract, 148.) This committee went to Burlington in July following in pursuance of these the resolutions appointing them. They went to confer and treat with Mr. Perkins, then superintendent of the B. & M. R. R. Co. Wooster Fay (Abstract, 144) imparts some information as to the conduct and statements of the company and some of its principal agents about the time this committee was appointed. He says:

"In the summer of 1868 I resided in Keg Creek Tp., Pottawattamie county, Iowa; in that year surveying party No. 4, under engineer Haven, surveyed a route through said Keg Creek Tp., under the direction of the B. & M. R. R. Co., from Red Oak to Council Bluffs; this party camped in my door yard four or five weeks; think the party left the work and went eastward in July; about the time of leaving engineer haven told me that we would not get the road—that it would be built through to Glenwood; when I told him the survey was a big expense to the company, he said it had cost $6,000, but that the company had made $100,000 out of Mills county; when I asked him how, he answered, "They have withdrawn the swamp land suit, given us a free right of way and depot grounds at Glenwood—that is, citizens of Glenwood would buy the right of way from the farmers;" the party left that day and never returned to the survey again; prior to this Haven told me of a conversation he had with a Glenwood man, in which the latter asked him if he could build a road from Red Oak to Council Bluffs, to which Haven answered, yes, a quarter of a million cheaper than through Glenwood; whilst the party were camped in my yard, Haven went with me a time or two to Council Bluffs, and charged me not to introduce him to citizens of Council Bluffs—said he did not want to be bored; party No. 4 consisted of six or eight persons and included Noah Hanks; this party left my place and camped near Council Bluffs, on Glenwood road, for a time, and then camped again in my yard; during this time the

Railroad company were not building any road west of Red Oak."

Noah Hanks (Abstract, 144,) a member of the surveying party under the chief engineer, tells what the secret policy of the company was, and some conduct and statements of the chief agents of the company, about the time of the appointment of this committee. He says:

"I was a member of party No. 2 sent out by the B. & M. R. R. Co.; chief engineer Teilson had immediate charge of No. 2; early in the season of 1868 No. 2 came to Glenwood from Red Oak; I had been with the party a month at that time; it was the understanding with our party before we left Red Oak that the road was to be built through Glenwood on the route that we were about to survey; we got this from the way Teilson talked; he said he wished to establish part of the line about Glenwood—that that would be the permanent line through Glenwood—making an intersection with the St. Joe road; he told us not to talk too much, that we were not to know anything about it; it was to be the final route, but we were not to tell it; this understanding and talk was at Red Oak; there were three parties there at the time, Nos. 1, 3 and 4; we left Burlington in March or April, and were about a month in reaching Red Oak; my party, No. 2, came on to Glenwood, and went to work running routes down Keg Creek, through Glenwood; we run the route where the road now is; I stayed with No. 2 until this survey was made, and then, under Teilson's orders, went to Red Oak and joined No. 4, under Haven, and remained with No. 4 till August, working from Red Oak to Council Bluffs, running a trial line, and whilst running this trial line, Teilson (Chief Engineer) was with our party every once in a while; Haven and Teilson had their private talks together at Indian Creek, Mosquito Creek, and twice at Council Bluffs."

CROSS-EXAMINATION.

"Can't say exactly when survey through Glenwood (by party No. 2) was made; it might have been in June; we ran several trial lines through Glenwood—can't say that these were to influence or scare the people of Glenwood; it is common to run trial lines before final location; the engineers often talk together—they do this to keep the boys from talking too much; the line from Red Oak to Council Bluffs was a trial line.

RE-DIRECT.

"After running the trial line from Red Oak to Council Bluffs we run back and located about half of it; at first our work was done with great care, but towards the last, Haven, the transit man, told us we need not be so particular, as the probability was the road would go through Glenwood; this was towards the last of the survey; in August we returned to Burlington, reaching there August 17th, 1868."

E. C. Bosbyshell, one of the committee, abstract, 146), relates some material facts, occurring both before and at the interview with Mr. Perkins. He says:

"I have lived in Mills County since 1856; engaged in merchandising; was County Judge in 1857-8; knew J. F. Joy; first met him on a steamboat on my way to St. Joe—think he was president of the B. & M. Railroad at the time; he told me on this occasion that he did not know whether they were going to run the road through Mills county or not—that his company hated to run a road through the country where the people were fighting them; that it was hard to run a road through when the people were fighting them all the time; I told him I did not

know that we were fighting; then he said this suit, referring to the suit then pending of *Mills County* vs. *The B. & M. R. R. Co.*, that the people ought to go to work and settle it, or have it settled; that in these times nobody was independent of railroads; that he did not want to run a railroad through a county where the people were fighting him; that he did not know, could not tell, where the road would be built; don't think he said that the road would probably have two ends; prior to this the company had run a line from Red Oak to Nebraska City, and I think suggested to Joy that if they built on that line they woult not run to Glenwood also; that was my idea of the battle, but I don't think he said anything about that; this conversation was some time before the company commenced work in Mills county; when I came home I related this conversation with Joy to quite a number of my friends here; I was one of the committee sent to Burlington in July, 1868, with the celebrated proposition; when we started it was a question of great doubt whether or not we would get the road through Mills county; there was some excitement, and everybody was interested more or less to have the road; Mr. Perkins said to the committee at Burlington that the company would require the right of way through the county, if they ever ran the road there, and that he did not know that we could get it then ; he wanted the county or private individuals to guarantee a free right of way; Mr. Perkins also said something about the remission of taxes for two years; said he could not guarantee what the company would do; that he would submit our proposition to the directors and would let us know what was done; after our committee came back from Burlington, a bond, signed by two hundred citizens of Mills county, guaranteeing rtght of way, was forwarded to the company, and declined because of its numerous signers; then another one, signed by a few of us, was gotten up; under this arrangement we went around and got some of the right of way released, and the residue was afterwards con-

demned and paid for, partly by taxation and partly by private subscription; our committee to go to Burlington was appointed June 2nd, but we did not start until July 11th.

CROSS-EXAMINATION.

"The proposition submitted by the committee was prepared at Burlington in the Barrett House; it was after we had submitted the written proposition that Perkins brought up the questions of right of way and taxes; our authority did not go beyond the written proposition; I could not say that before our appointment there was no talk among the citizens or fears expressed that influenced or affected the proposition; I think the citizens here were anxious to have a railroad, and at that time did not know where it would go.

RE-DIRECT.

"I did not mean to say in my cross-examination that there was no feeling or solicitude in regard to where the road would go, and that that was no part of the feeling which caused us to make the proposition; there was really a great desire prevailing in the minds of all parties interested in that proposition to secure the road; we were all anxious to have it; the board of supervisors probably authorized the proposition for the purpose, in part, of securing the road; the written proposition was just what it says it is."

Mr. Bosbyshell says that Mr. Perkins in this in this interview said something about the remission of taxes for two years. This was doubtless said in a significant way, for the testimony shows (abstract, 272) that in September, 1868, after the submission of the proposition to Mr. Perkins, and before its accept-

ance by his company, at the instance of Mr. Hale, the board passed a resolution remitting the taxes for two years.

Mr. Perkins is an intelligent man and an adroit witness. From his testimony no one can conclude that he lacked fidelity to the interests of his company. Two facts, however, stand out upon his testimony. He admits the running of divergent lines from Red Oak, and that the running of these lines would have the effect to stir up strife among the people. He further admits that he did know at the time the proposition was made to him in Burlington, that the object of the committee, and the object of the board of supervisors, in making this proposition was, to secure the line through Mills county and a depot at Glenwood, and that the committee and the board of supervisors, in making this offer, were actuated by a fear that if they did not make it the road would go elsewhere (abstract, 224). Further on in his deposition Mr. Perkins is asked this question:

Q. "State now, Mr. Perkins, what effect, if any, this proposition through the agents of Mills county had upon your company as an inducement to build their road through Mills county and locate a depot at Glenwood?"

A. "I think the effect was very slight, and that the road would have been built there anyway, on other considerations."

From the foregoing, the *fraud* on the county is most conclusively established. Early in the season of 1868 the chief engineer told Hanks, and other members of the surveying party, that the route was established through Glenwood, but that the fact was to be concealed from the people. Why concealed? Why were the engineering parties kept out on these wild lines until the month of August? The true answer is that the railroad company was seeking by these means to prey upon the

fears of the people of Mills county and upon the board of supervisors, and so extort a devotion of the lands to the railroad company, accompanied with a free right of way, and a remission of the taxes upon all the lands owned by the company for rt least two years.

But not only are these five deeds tainted with fraud, but they are actually without any consideration. It cannot be said the quit claim deeds given by the company to the county furnished any consideration. The lands described in these deeds were all swamp lands. The title thereto was already in the county *iu trust*. The claims of the railroad company to these lands was of no higher order than the claim of the highwayman to the purse of his victim. It had nothing to convey, and as a matter of fact and law it conveyed nothing. The same line of argument applies with equal force to all the other supposed conveyances made by the railroad company to individuals, who had previously purchased from the county.

The discussion thus far has conclusively established four propositions, vix:

1. That the lands in suit are swamp lands.

2. That being swamp lands, it was not competent for the county to make the contracts and deeds assailed in this action.

3. That under the Statutes, and the facts and circumstances of the case, the B. & M. R. R. Co. and its grantees are not bona fide purchasers without notice.

4. That the deeds assailed are not the deeds of the county.

With these ultimate facts, as premises, we submit that the decree of the court below should have been for the Plfi. in all

of its branches, and we might leave the case without further argument so far as the first three assignments of error are concerned.

4th. The defense interposed suggests that the real question is not one of power to devote swamp land to the making of a railroad, but rather of the settlement of a law suit involving swamp land.

It is believed that the facts will show that this defense is utterly groundless.

1. At the date of the submission of the proposition to Mr. Perkins, the county in the former action had obtained a decree in the district court, establishing and quieting her title to these lands, as against the Railroad company. This decree after the fullest consideration, had been affirmed by the supreme court of Iowa. The railroad company had taken the case on error to the supreme court of the United States, where it was then pending, but the decree of the State court was in no wise affected by that proceeding. In other words, at the date of the proposition, it had been judicially determined that the lands were swamp lands, and this decree was then unreversed and in full force.

2. An analysis of the proposition itself will aid in a proper understanding of its terms (Abstract, 92-94.)

That part of the proposition relating to the suit is as follows, viz: "There are in dispute between the parties to said law suit, 23,316 acres (lines 8 and 9.) It is understood that the suit now pending should be continued by agreement of parties from term to term until the conditions of this contract or proposition shall have been complied with (lines 41 to 44.) In case said Railroad

company shall fail or neglect to build said railroad, through Mills county, via Glenwood, and also to build and establish a depot at Glenwood in that county, then and in that event the said law suit shall stand for final hearing in the supreme court of the United States the same as if this proposition had never been made. In case the suit is settled on the basis of this proposition each party shall pay their own costs (lines 49 to 55.)"

That part of the proposition relating to the securing of a railroad through Mills county via Glenwood is as follows, viz: "For the purpose of having our proposition understood, we acknowledge that we owe you acres of land to the amount of 23,316 (lines 10 and 11,) to pay which we have and offer you odd sections, vacant, (most of which is a part of the 23,317 acres,) and even sections patented to the county and unsold, in the aggregate 9,080 acres; balance of the land due you, 14,239 acres. For the further payment we have and offer you, of the odd sections, (about all of which is of the 23,316 acres claimed by you,) subject to pre-emptions made through the county, acres to the amount of (on which nothing has been paid to the county) 4,660. Of these pre-empted lands, we estimate that about one-half of the pre-emptions are fraudulent, and ought not to be recognized, but the county must ask that when bona fide pre-emptions have been made on the same, the pre-emptors must be secured in their right to the same, and have the privilege of purchasing, at $1.25 per acre, of the county or company, which amount shall, in any event, go to the Railroad company. Now you will have land for land, subject only to the pre-emptor's claims, until there will be due you in acres 9,576. The remainder, 9,576 acres belong to bona fide settlers and purchasers, who, we must insist, shall be protected by the county; and as we have paid you all the lands we have we offer you for the balance $10,000 in money. The company should understand that the balance of 9,576 acres, is the land, portions of which it has been settling

with our individual citizens for, and there is included in the 9,576 acres, all the lands the company has sold to citizen settlers at $1.25 per acre. With this understanding the $10,000 we offer you will be just as much less than 9,576 acres as the company has thus sold, and therefore our pay would perhaps amount to $1050 or more (lines 10 to 40.)

"It is further understood that the foregoing proposition shall not be binding on the county of Mills unless said Railroad company shall complete said Railroad through Mills county via Glenwood, and build and establish a depot at Glenwood in that county (lines 45 to 51.) The manner of transferring the lands, whether the county shall deal with the purchasers and preemptors, or whether the Railroad company under the restrictions indicated, the county is not particular about, but will agree to what seems most practicable (lfnes 56 to 60.)

"The amount in acres as stated above may not be exactly correct, and probably is not, but it is believed to be nearly so, *but we wish it understood that the company shall have all the swamp lands the county now holds or is entitled to in Mills county, Iowa*, subject only to the conditions indicated in the foregoing (lines 61 to 66.)"

We have thus set apart in separate divisions all that relates to the settlement of the suit, and all that relates to the making of a railroad, so that the provisions of the proposition may be clearly apprehended. The first division simply states the subject of the suit (lines 8 to 9.) Next it provides for the suspension of the action unless the conditions of the proposition are complied with (lines 41 to 44,) and lastly it declares that if these conditions, viz: the building of a railroad through Mills county via Glenwood, and the establishment of a depot at Glenwood is not done, then that the suit shall stand for final hearing in the

supreme court of the United States, the same as if the proposition had never been made (lines 49 to 55.)

In this view of the case, it was a proposition to the Plff. in error to give all the swamp lands held by the county, and situated in the county of Mills, in consideration that the Railroad company would make its railroad through Mills county and build and establish a depot in Glenwood. Accompanying this offer was the condition that the suit be continued until the main proposition could be complied with, and if not complied with, then that it should stand for final hearing, the same as if the proposition had never been made, and the further condition that *if* the suit should be settled on the basis of the proposition, then that each party should pay its own costs. Hence we submit, in all candor, that the proposition was a proposition to continue the suit, and not a proposition to settle it.

Passing now to the second division of the proposition, it will be found to be this and nothing more: In consideration that the Railroad company will build its road through Mills county via Glenwood, and build and establish a depot at Glenwood, Mills county will give to the Railroad company all the swamp lands it now holds or is entitled to in Mills county, amounting to 23,316 acres, that is, the county will give odd swamp land sections, vacant, and even swamp land sections patented to the county, amounting to 9,080 acres, and odd swamp land sections, subject to pre-emption rights, upon which the county has received nothing, 4,669 acres, making an aggregate of 13,740 acres. In lieu of the remaining 9,576, which now belongs to bona fide purchasers from the county, the county will give to the Railroad company the sum of $10,000 in money.

This we believe to be a fair statement of the proposition as a whole. Beyond all doubt it was a proposition to devote the entire

remaining swamp lands, and their proceeds then due from pre-emptors, and ten thousand dollars in money, to the making of a railroad. It was a proposition to divert a trust estate, and being such, it could only be carried out by a compliance with the statutes relating to the devotion of these trust lands to the making of a railroad. The suggestion in the body of the proposition that the suit be continued until the proposition could be executed, is not repugnant to the idea that the proposition was to be executed according to the statutes, in the matter of such devotion to railroad uses, and in any view of the case, the continuance and final settlement of the suit was subordinated to the main proposition, viz: the making of the railroad through Mills county via Glenwood, and the establishment of a depot at Glenwood.

In the court below the defendants cited *Grimes* vs. *Hamilton Co.*, 37 Iowa, 290, as authority in this case. But the cases in their facts and circumstances are dissimilar. In the case cited plaintiff's claim was a proper charge on the trust property. The county was the trustee and charged with the administration of the trust estate. It was competent for the board of supervisors to make the contract with Baker, and to charge the expense thereof to the trust estate. It was the duty of the county to secure the trust property, and in doing this it had authority to employ means and agencies. Baker was employed, and was to have a pro rata of all the lands and a percentage of all the money recovered. Having done his work he demanded his reward, and it being refused, he brought suit. Pending this suit, which was solely and entirely for services rendered the trust estate, the matter was compromised, by the terms of which Baker was to receive certain swamp lands belonging to the county, in full of his claim on the original contract, and to dismiss his suit. In pursuance of this compromise Baker dismissed his suit, and afterwards assigned his interest in the

lands. Baker and his assignee, Grimes, demanded a deed of the lands from the county, and the county refusing the deed, a second suit was brought for a specific performance of the contract of settlement with Baker. To the petition or demurrer was interposed to the effect that the board had no power to compromise a suit pending against the county. The demurrer was overruled, and the defendant electing to stand on the demurrer, judgment was rendered for the plaintiff, and for a specific performance. From this ruling and judgment defendant appealed. The supreme court affirmed the judgment below, upon the ground that the county had authority to compensate an agent for labor performed respecting the swamp lands, by conveying to him a portion of the swamp lands, and that as a sequence, it had the right to compromise a suit brought to recover such compensation.

But the principle thus laid down is not applicable to the case in hearing. The claim of Railroad Company to the swamp lands did not grow out of a service rendered in respect to the swamp lands, but was an adversary claim based upon the assertion that the lands in suit belonged to the railroad grant.

Hence we submit that the case cited is not authority in this case. Before passing from this point attention is asked to the record of the former action, (Abstract, 156 to 179) and especially to the docket entry, opinion and judgment, in the Supreme Court of the United States, pp. 177—178. The railroad company was the plaintiff in error, and not the county. If the proposition was a compromise, and was so treated by the railroad company, why is it that the fact was not brought to the knowledge of the Supreme Court, or to the knowledge of Mr. Rorer, counsel for the railroad company in that court? The record gives no satisfactory answer. If the railroad company treated

the proposition as a settlement, why did it make an argument before, and file briefs in the Supreme Court? Mr. Strong (abstract 234) says that the same argument was made and the same brief filed in both cases. If the proposition was a settlement why did the case pass to final judgment? The transcript from that court, (abstract 178) says that the cause was argued by counsel. Why argue if indeed the case was settled? Mr. Perkins (abstract 225) says that up to the time of the decision in the Fremont county case, he expected his company to succeed in the suit. But if it was already settled, why this expectation? Now we submit that there is no satisfactory answer to these questions found in the record. There is good ground to think that the railroad company knew that the contract and everything done under it was void, and that it either procured or permitted the cause to be submitted, intending to fall back on the decision, if favorable, or upon the deeds if unfavorable. In any event the submission of the cause had the effect of a waiver of so much of the proposition or contract as stipulated for a continuance. The record warrants us in going still farther. It shows that after the alleged settlement the parties again entered intered into a contest in the supreme court of the United States and argued and submitted the cause. By so doing the supposed stipulation to continue, or to settle, was ignored and nullified, and the parties to that suit, become bound by the judgment to be rendered therein. Thus in fact and in law the judgment of affirmation in the supreme court of the United States, is of itself a complete answer to the suggestion that the proposition was a settlement.

There is still another view of this proposition which shows that it cannot be regarded as any support for the claim that it was a settlement of a suit then pending. The instrument was an entirety. It proposed on the one hand to give all its swamp lands and $10,000 in money for the making of a railroad, and

on the other hand to make a railroad in consideration of said lands and money. On both parts the consideration was entire. But as we have before shown, the instrument in respect to the grant of lands was inchoate until approved by a vote of the people. We now submit that the instrument so far as it proposed to give $10,000 in money, was illegal. Under this state of facts the whole proposition or contract was void, including the stipulation to continue or settle, as the case may have been.

5th. Under the particular facts and circumstances of this case, is the plaintiffs estopped from recovering the lands in controversy.

It can not be disputed that if the lands belonged to the county they were not subject to taxation. If the contrary doctrine were true, it would be possible for the county, either by the carelessness or fraud of its agents, to be divested of its property by having it placed upon the tax list and sold for non-payment of taxes and conveyed by the treasurer as other property. Sec. 711, Rev. of 1860, provides that the property of the county, when devoted entirely to public use and not held for pecuniary profit shall not be taxed, and shall be omitted from the assessments required to be made. If these lands were swamp lands, then they belonged to the class of property devoted entirely to public use and not held for pecuniary profit, and hence were non-taxable; the attempt to tax them was forbidden by the statute. It even requires that they be omitted from the assessments. In support of this view see *County of Guthrie* vs. *County of Carroll.* 34 Iowa, 108, which holds that lands granted by the United States to the State of Iowa, and by the State to the county as indemnity for swamp lands granted to the State under the acts of Congress relating thereto, were not taxable

prior to the act of April 16, 1870, for the reason that said indemnity lands belonged to the class of lands known as swamp lands. See also *The Iowa Railroad Land Co.* vs. *Story County*, 36 Iowa, 51, holding that the property of counties not held for pecuniary profit, is not taxable, and the swamp land of the county is such property. Even in the absence of express exemptions, the property of the State and county could not be subject to taxation, and the attempted taxing and sale of such property would be void (Dillon on Corporations, Secs. 614-15, and notes thereto).

The C., B. & Q. R. R. Co. (abstract 107 p. 24) alleges that the B. & M. conveyed some of their lands to the third persons, and that some of these deeds were put on the records of the county, and that the county had assessed and levied taxes thereon, and had collected taxes from the vendees. To this part of the answer plaintiff replies (abstract, 131 p. 14) denying that the B. & M. R. R. Co. ever had any title to the lands, and denies that the lands were taxable, and alleges that the grantees of such deeds had notice that their grantor had no title in the lands before taking said deeds, and denies every other matter and thing therein contained. In respect to this issue it is sufficient to say in this place that it is a matter which can not be interposed by the C., B. & Q. Co. When these alleged grantees of the B. & M. R. R. Co. complain and suggest these matters, it will be time enough to meet and dispose of the same, and that until such time the matter must be regarded as immaterial to the issue between the plaintiff and the C., B. & Q. Co.

The C., B. & Q. Co. (abstract 106 p. 22) further alleges that certain of the lands were subject to taxation for years prior to year 1866, and were sold for delinquent taxes, and were redeemed from such sale by the B. & M. R. R. Co. prior to

1868, and that these facts estop the plaintiff from setting up title to the lands in controversy.

The Plff. for reply to this part of said answer (Abstract, 138) denies the averments in said paragraph contained, denies that the alleged assessments, levies, sales and redemtions were its acts; denies that the persons making the same did so by the authority or with the knowledge or approval of the county; denies that any of these acts were done under any warrant or authority of law, and denies that by reason of said acts the C. B. & Q. Co. acquired any right to or interest in the land so redeemed, and denies that the county is estopped by the matter contained in said paragraph 22 of said answer.

In respect to this issue, we submit that there is no competent evidence of the matters alleged; that there is no competent evidence that the C. B. & Q. Co. has any legal claim or title to the lands so redeemed. When the B. & M. Co. complains of these doings and shows that the alleged assessments, levies and sales were the acts of the county, and further shows a valid right of redemption from such sales, it will be time enough to meet this question.

The Defts., Peter Eckley, W. H. Eckley, Geo. S. Wilson, Otis E. Allis (Abstract, 135-6,) and the answers of Hinson, Crewdson and Cavanaugh (Abstract, 127-8,) severally claim title from the B. & M. Co., aud claim to have paid taxes for 1871-2-3, and allege this as matter of estoppel. The Plff., in reply to this (Abstract, 140,) denies the collection of such taxes, and alleges that if such taxes were so collected, that the same was done through mistake, and is not the act of the county,and that the officers who did this had no atuhority to do any act which would forfeit the right of the county. As stated in another part of this argument, these last named defendants offered

no evidence whatever in support of their supposed defenses, and hence it is unnecessary in this place to consider the matter of estoppel by them set up in their several answers. In any event the taxes paid by them were so paid with knowledge that the lands belonged to the county and were not taxable.

The answer of the B. & M. R. R. Co. (Abstract, 101) shows conclusively that it "disclaims any interest in any of the lands in controversy." To this answer, plaintiff replies (Abstract, 133) disclaiming any knowledge of the matter set up in said answer, and re-affirming all the allegations of the petition, and asking decree as therein prayed for.

The answer of Brooks, Hardy and Griswold (Abstract, 125) and the several answers or interventions of the defendants, Boswell, Weiren, Robbins, Glen and Kritz, are silent as to all matters of taxation and estoppel.

The answer of the C. B & Q. R. R. Co. (Abstract, 105 p. 20) further alleges that the county, by its proper officers, assessed and levied taxes on the land in suit, and placed them on the tax books as owed by the B. & M. R. R. Co. for 1870-1-2-3-4, and that the Railroad company paid and the county treasurer received the taxes for those years, and that the county recognized the company as the owner of the land and was estopped from claiming the land from the company or its grantees. To this part of the answer, the plaintiff, for reply, (Abstract, 130 p. 12,) denies that it assessed and levied taxes on said lands as owned by said company for said years 1870-1-1-3-4, and avers that if said lands appear on the tax books as owned by the Railroad company, then that the same was unauthorized and not the act of the county. Plaintiff further denies that it ever in any manner recognized the company as the owner of said lands, and avers that during the years 1870-1-2-3-4 said lands were owned and

held by the county, and were not subject to taxation. Plaintiff further avers that if any of said lands are on the tax books as owned by the Railroad company, then that the same are there by mistake, *or by the procurement* of the Railroad company.

The foregoing presents the issue on the averment of taxation and estoppel as between the C. B. & Q. R. R. Co. and the plaintiff, and to this issue we now pass, and respectfully ask from the court the fullest consideration of the facts and of the points which we shall make.

1. The lands, whilst owned by the county, were not taxable. They were swamp lands, and no county officer had authority either to place them on the assessments or to receive taxes thereon, or to sell them for delinquent taxes, or to suffer any one to redeem same from taxation. All such supposed acts were irregular and void, and of themselves worked no estoppel. Dillon on municipal corporations (See 381) lays down the rule in case of contracts in excess of authority, and of *ultra vires* as a defense, in such clear and concise language, that we here quote the same as applicable in its principles to cases of taxation and excess of authority, and of *ultra vires* as a defense:

"The general principle of law is well settled beyond controvery, that the agent, officer, or even the city council of a corporation, cannot bind the corporation by any contract which is beyond the scope of its power, or entirely foreign to the purposes of the corporation, or which (not being in terms authorized) is against public policy. This doctrine grows out of the nature of such institutions, and rests upon reasonable and solid grounds. The inhabitants are the corporators—the officers are the agents of the corporation. The duties and powers of the officers or public agents of the corporation are prescribed by the statute or charter, which all persons not only may know, but are bound to

know. The opposite doctrine would be fraught with such danger, and accompanied with such abuse, that it would soon end in ruin or be legislatively overthrown. These considerations vindicate both the reasonableness and necessity of the rule that the corporation is bound only when its agents or officers, by whom it can alone act, if it acts at all, keep within the limits of the chartered authority of the corporation. It results from this doctrine that unauthorized contracts are void, and in an action thereon the corporation may successfully interpose the plea of *ultra vires*, setting up as a defense its own want of power under its charter, or constituent statute, to enter into the contract."

Estep vs. *Keokuk County*, 18 Iowa, 199, recognizes the principle above enunciated as applicable to county officers.

Corporations may defend against an unauthorized contract, even though its seal be attached to it

Leavenworth vs. *Rankin*, 2 Kansas, 358.

2. The C. B. & Q. Co. has nowhere shown that it acquired its interest in these lands, with knowledge of the alleged acts of taxation, and with reliance on the same as matter of estoppel, against the claims of the county in this action. If the alleged acts of taxation were not the acts of the county, but rather the unauthorized acts of persons who happened to be county officers, and the C. B. & Q. Co. purchased without knowledge of, reference to and reliance upon said supposed taxation, then it follows as a legal deduction that the C. B. & Q. Co. cannot set up these unauthorized acts as matter in estoppel. This principle of law is conclusively announced in *McCracken* vs. *San Francisco*, 16 Cal., 591, and cases there cited.

3. The only testimony offered by the C. B. & Q. R. R. Co. in support of this branch of the defense, is found in the depositions of C. W. Spaulding and W. W. Peet, and the oral testimony of said W. W. Peet, W. H. Taft, and of M. M. Angell. We here detail the testimony of these witnesses in the order above named:

C. W. SPAULDING (Abstract, 188): I am now secretary of the land department of the C. B. & Q. Co.; was local agent of the B. & M. Co. at Glenwood in 1870. The list "A" (Abstract 193) is a list of the lands in controversey. The taxes were paid as shown therein for 1870-1-2-3, amounting to $4,125.36. The list was made by me, and [compared with the original tax receipts, and is correct.

At the taking and on the trial this list was objected to as incompetent, but no ruling was indicated by the court, nor was the objection waived.

W. W. PEET (Abstract, 188): I have charge of the tax matters in the land department of the C. B. & Q. Co. The list "A" (Abstract, 228) contains lands on which I offered to pay to Wm. Hock, treasurer of Mills county, April 9, 1875, the taxes for 1874: and the list "B" (Abstract, 230) contains lands on which I offered to pay the same treasurer, Nov. 2, 1875, the taxes for 1874, and the list "C" (abstract 131) contains lands on which I offered to pay the same treasurer, November 2, 1875, the taxes for 1874. I left no money with the treasurer on these occasions. When he refused to give me the receipts I demanded, I took the money away with me. When I offered to pay, he said he would take the money, and "Here are your receipts." They were not in the usual form. I demanded receipts without any qualifications. The receipts offered me by the treasurer

had these words added, "Received under protest; the board of supervisors has ordered me not to collect the above tax." These were the only objectionable things in the receips. The receipts were in the usual form, except the above words. I reported the facts above detailed to the Railroad company, after my return from Glenwood, on each occasion.

The above is the testimony of witness Peet, by deposition taken in Burlington. On the trial he was again introduced as a witness, and said (abstract 249):

I paid taxes this day upon some of the lands in suit, for 1875, amounting to $202.84. Exhibit "A" (abstract 251) is the list paid on. I paid these taxes to-day, July 11, 1876. I am the same W. W. Peet whose deposition has already been taken, and am the same person who made efforts to pay taxes on these lands for 1874. Mr. Touzalin, my superior, instructed me to come here and pay these taxes at this time. I arrived here on the express at 9 o'clock A. M. to-day. The former treasurer, Hock, refused to receive the taxes on every one of the tracts on which I paid to-day. I stated in my former deposition how I made the tender to Hock and how he refused. I did not expect that he would receive the money. I decline now to answer whether or not the treasurer, at the time of such tender, offered to give me a receipt. At the times of making such tender in 1875, I knew that there was a lawsuit pending in regard to the lands, and when I paid the taxes to-day, I knew that this suit was pending, and involved the lands on which I paid, and knew that the former treasurer had refused to take the taxes on these lands, and give the ordinary receipt. I knew the reasons for such refusal, and these reasons were present in my mind when I paid the taxes to-day. The former treasurer told me at the time of the tender to him, that the board had ordered him not to collect the taxes on these lands. I

did not inquire, before paying to-day, whether or not this order had been rescinded. The presenl treasurer said nothing about the order, and I asked him no questions.

M. M. ANGELL (abstract 251): The list here shown me —(abstract 182)—was made by me from the tax lists in the office for the years 1871 to 1874 inclusive. It is correct. I only know it is what the books indicate. I have no personal knowledge of anything stated in the list.

To this testimony of Angell, and especially the list on abstract 253, the plaintiff at the time objected, and his objections were overruled and exceptions entered, as shown on abstract 251.

Having given all the evidence offered or used by the defense in support of the alleged taxing of the lands, we next produce the evinence of the plaintiff in rebuttal:

D. M. MITCHELL (abstract 266): I was auditor of Mills county in 1870 and 1871. My recollection as to how the land in suit came on the tax list is, that some time in January or February, 1871, Mr. Atkins, then treasurer of Mills county, came to me and said that the railroad company, by its agent, had come in and wished to pay taxes on these lands, and that the lands were not on the books. Atkins suggested, as the company wished to pay. he thought the lands ought to be put on the books, so that we could receive the money and give the proper credits. I recollect about disputing with Atkins about our authority to put the lands on, but we finally concluded to do so) and I went to work, and from lists furnished by the railroad company put the lands on the books as an addenda to the tax books. Before this, I, as auditor, had passed the

books over to the treasurer, and for the reasons aforesaid I placed the lands on the tax books as an addenda. This was in the beginning of 1871. In preparing the township assessors' books for subsequent years, we obtained descriptions and owners' names from the former tax lists and transfer books. All the lands in the county, I believe, were put on the assessors' books, and the owners' names where known. I don't know any particular reason for including the lands in suit. The plat of transfers were kept in my office, and there was indicated thereon in pencil, the names of the last grantee of deeds filed in the Recorder's office. My term of office expired with the year 1871, and Mr. Powell succeeded me as auditor. In 1868, the board remitted the taxes for 1868 and 1869. The list furnished by the railroad company in fore part of 1871 was put on the tax books for 1870. I don't know whether the fact that the agent of the railroad company paid taxes on the lands was known to the board of supervisors in 1871. I don't know whether the matter was brought up and explained to them or not.

A. J. HIGHT (abstract 267): In the year 1873, I think it was, I assisted the auditor in making out the assessors' books and in putting the lists of lands thereon for that year. So far as known, we wrote the owners' name in pencil opposite the descriptions, so that the assessor might erase and make corrections. We obtained descriptions and owners' names from the former tax books and the transfer books. We put on the assessors' books for that year every acre of land in Mills county, including, of course, the lands in controversy. The transfer books were kept in the auditor's office. It was his duty to enter transfers therein.

CHAP. 61, ACTS 1866 (abstract 268): An act for the transfer of real estate and to regulate the assessment thereof, and to

facilitate the collection of revenue, making it the duty of the recorder to enter the names of the grantee in all unconditional conveyances in a book kept in his office, and to endorse on the deed, "Entered for taxation." The duties of transfer were by Chap. 168, Laws of 1868, conferred on the county auditor.

LEWIS ROBBINS (abstract 268): I was a member of the board of supervisors of Mills county for 1873-4-5. At our September, 1874, meeting, we ordered that the lands in suit be not placed on the tax books at all. At the October meeting we discovered that the order had not been entered of record, when we repeated the order. I did not know but that this order was recorded until the January, 1875, meeting of the board. At that meeting the order was renewed and entered of record. At the September, 1874, meeting it was understood that the lands should not go on the tax lists. The tax books had not yet been made out for 1874. At the January, 1875, meeting, the books were made out, and the lands in suit were on them.

ORDER OF THE BOARD (abstract 269) January 4, 1875: "We anthorize the above minutes to be corrected so as to show that at the meeting of last date it was ordered that the taxes for the year 1874, on the swamp lands, the title of which is in dispute between the county and the B. & M. R. R. Co., be not collected, and that the auditor be authorized to furnish a list of said lands to the treasurer, which list shall be his authority for not making such collection.

D. W. WHITFIELD (abstract 269): Was a member of the board in 1874. At the September meetingr, 1874, it was unanimously agreed not to receive taxes on the lands in suit,

but the order did not get on the record till January, 1875. The auditor made no excuse for not recording it. It should have appeared in the proceedings of 1874. From hearsay I knew that county remitted the taxes on the lands of the railroad company for 1868 and 1869.

JOHN BARBOUR (abstract 270): I took my seat on the board at the commencement of 1874. At our September, 1874, meeting we resolved to order the lands in suit to be stricken from the tax lists, and that they be not put on the lists. I don't know that we ordered the auditor to put it on the minutes. At least, we found at a subsequent meeting it had not been done. I know that I called it up at the October, 1874, meeting, and said that it must be done. I inquired of Mr. Taft if it was entered in the September meeting. He said it was not, and that the lands had all been entered on the tax lists, and we said that they must be stricken off; that the taxes must be cancelled at that time. This was the October, 1874, meeting. It was my understanding that it was done at that meeting. At the January, 1875, meeting, we found that the record said nothing about it, and we then saw that it was put on the record, as of the October, 1874. meeting.

This witness, on cross-examination, further said:

At the October meeting I considered that we did direct the auditor to put the order not to tax down. We made the same order as we did with other business. I called it up. We voted as we did with a good deal of other business. We said it should be done, and I think we directed the auditor, Mr. Taft, to do it at that time. He was there, and I suppose he heard. I can't say whether he did or not. I think Mr. Robbins spoke to him about it—told him the board did not want these lands to be

axed. It seems that the auditor did not obey. The lands at that time, October 1st, 1874, had been entered on the the tax books. We said they must be stricken off. I am still a member of the board. It was the understanding of the board that the lands were not to be taxed for 1875. I think there was an action of the board to that effect; that the lands were to be stricken from the lists of 1875. If they are on the lists for 1875, it is not by authority of the board. The order of the board (as to 1874 tax) has never been recinded. The board passed the tax books for 1875 from the auditor to the treasurer in the usual manner. It is not expected that the board will go over the books and see that the auditor has made no mistake when we pass them over. Of course the passing of the books is our action, but if the auditor makes any errors, it is not expected that we will go through the tax books for them.

The defendants offered as rebutting evidence, W. H. Taft, (abstract 273) who stated that he was auditor for the years 1874 and 1875. That he received no instructions from the board in September or October meeting concerning the striking of any lands from the lists of that year; that he knew that the lands in suit were on the tax books for that year, and that they were not stricken off for that year.

Also M. M. ANGELL (abstract 273) who stated that he had received no instructions from the board not to collect the taxes on any of the lands on the books turned over to him, and that there was nothing on the books indicating but what he might take the taxes for 1875 on the lands on which witness Peet had just paid.

We have thus marshalled all the evidence on the matter of

the alleged taxing of the lands in suit, and deduce from it the following ultimate facts, viz:

a The lands were not assessed for the years 1868, 1869 and 1870, nor were they a subject of tax levy for either of those years, nor were they on the tax books for 1868 and 1869, nor on those of 1870, until put there in 1871 by the procurement of the railroad company, and from a list furnished by the company.

b For the 1871, and subsequent years, the assessor's books were copied from the tax list of the previous year, and the transfer books.

c Whatever taxes were paid on those lands for 1870–1–2–3 by the company were paid after the company had thus procured the lands to be entered on the tax books.

d There is no evidence showing that these things were ever known to the board of supervisors, until some time in 1874.

e In the year 1874 the board ordered that the lands be not placed on the tax books for that year, and failing in this, they ordered the treasurer not to receive any taxes for that year. The board also ordered that the lands be stricken from the list of 1875.

f The company made three attempts to pay the taxes of 1874, and were as often told that the board had ordered the treasurer not to receive the taxes on the lands.

g Taft, the auditor, and clerk of the board for 1874, was also auditor, and clerk for 1875. He made up the tax books

for both of those years. He knew that the will of the board was, that these lands should not go on the tax books at all, yet he placed them there for 1874 and also for the year 1875, and concealed the fact from the board, thus showing a willingness to serve the railroad company, rather than the county of which he was a sworn officer.

h Whatever taxes were paid on those lands for 1875 were paid with the knowledge that the board did not intend the lands to be on the tax lists, and did not intend the treasurer to take the taxes thereon, and whilst this suit was on trial. They were paid to Mr. Angell, the new treasurer, who had just entered upon his duties, and who was not presumed to be acquainted with all books and files of treasurer's office. Hence when he says (abstract 273), there was nothing on the books to indicate but what the taxes on the lands were to be collected, it is but charitable that we believe him.

i When Peet paid the taxes for 1875 he knew that this suit was on trial; he knew that the former treasurer had refused to take the taxes on these lands; he knew the reasons for such refusal; he asked no questions as to whether or not the former order of the board had been recinded; he found a strange man in the office as treasurer, the books showed nothing indicating but what he might pay on a portion of the lands, at least, for 1875, and so he just paid over, and hurried up into the court room and swore to the fact, thinking that it would estop the plaintiff in this action.

j Whatever taxes were paid by the railroad company, at any time, after the proposition or contract of 1868, were so paid with notice that the contract was not submitted to a vote of the people until October, 1871, and that the whole arrangement was repudiated by that vote.

Now, applying the well estabiished principles of law to the facts thus found, we submit that a case of estoppel is not made out.

The facts and circumstances of this case are so essentially different as to make a new case before this court, as will be apparent from an examination of such reported cases.

The County af Guthrie vs. *the County of Carroll*, *supra*, holds that swamp lands are not taxable and treats them as lands held by the county under a special trust, and liable to be disposed of only in the particular mode prescribed in the statutes. Hence a tax title based upon a sale of such property for supposed delinquent taxes would be utterly worthless. The general principle is well established that a corporation is never estopped when the act involved is either expressly or by necessary implication prohibited by statute.

The Cedar Rapids and Missouri River Railroad Company vs. *Boone County*, 34 Iowa, 45, holds that it is competent for the board of supervisors to submit to a vote of the people a proposition or contract to devote swamp lands to the making of a railroad. A fair implication from that opinion is, that without such authoritative vote such proposition or contract must be held void.

The Iowa Railroad Land Company vs. *Story County*, 36 Iowa 49, is perhaps the earliest of the estopped cases. In that case the county, by a contract approved by a vote of the people, devoted its swamp lands to the making of a railroad. The company complied with the contract on its part, by building the road, and then demanded a deed of the lands, which deed the county neglected and refused to make after repeated demands, and at the same time that it was refusing to convey to the rail-

road company, it caused the lands to be taxed as the property of the railroad company, and the taxes being unpaid, it sold parcels of the land with other delinquent property, and tax deeds were about to be made to the purchasers. The suit was to enjoin the making of such tax deeds. The opinion holds that upon the board principles of equity, the county could not wrongfully withhold the title and at the same time tax the lands as the property of the railroad company.

The radical difference between that case, in its facts and circumstances, and the case now before the court, is that in the case cited the county caused the lands to be taxed, whilst in this case the company procured them to be placed on the tax books, and then paid the taxes thereon without the knowledge or approbation of the board of supervisors.

Hence, whilst in the one case the equities were with the railroad company, in the other they are with the county.

Adams County vs. *B. & M. R. R. Co.*, 39 Iowa, 507, is the next of these cases. It is a suit in equity to establish and quiet plaintiff's title to certain lands as being swamp lands. The defendant claims title as being railroad lands, and avers that by fraud of the plaintiff's agents the lands were selected as being swamp lands, and further avers that on a contest before the proper officer in 1861, at Washington, the lands were decided as belonging to the railroad grant, and certified accordingly; and further that plaintiff from that time recognized the defendant as owner of the lands and from 1861 to 1868 inclusive taxed them to the defendant. It appears that at the June session, 1869, of the board of supervisors, the defendant petitioned the board, asking a remission of taxes on the ground that the same were illegal. That at that time the taxes, including in-

terest, on defendant's lands, then delinquent, amounted to $22,-610.00.

The matter was compromised by the defendant paying $10,-000, in cash, in full of the whole claim of the county.

The opinion assumes that the lands in suit were included in the list of lands thus compromised, and that the county, with a full knowledge that the defendant claimed the lands in dispute, taxed them for the year 1861 to 1868 inclusive, as the property of the defendant, and took, by way of compromise, a large sum of money, without making any claim to any of the lands so taxed. The opinion holds that the county having recognized the railroad company as the owner of the lands, and having taxed the lands as the property of the defendant, and having thus secured an advantage to itself, it is now estopped from denying the existence of the fact upon which such advantage was secured. Several cases are cited in support of the opinion, but it is submitted in this place that they are valueless for that purpose, except possibly the Story County case, *Supra*, for the reason that in each case the parties are private persons, whilst in the case to be supported one of the parties is a civil corporation.

The marked difference between the Adams county case and the one now in hearing are, that in the one case the lands belonged to the railroad grant, in the other to the swamp grant. In the one case, the property in the lands was in the railroad company—at least the opinion assumes that fact—in the other case the property was in the county in trust. In the one case, the county caused the lands to be taxed as the property of the railroad company. It was the intelligent and intentional act of the county. In the other case, the county did not originally

place the lands upon the assessment, nor did it subject them to a tax levy, nor were they carried upon the tax books—on the contrary the railroad company itself produced a list of the lands, and procured the same to be entered upon the tax books then in the treasurer's hands, without the knowledge or approval of the board of supervisors. In the one case, the assessments and levies were made upon the lands from year to year, as being the property of the railroad company, and the compromise that was ultimately made, and upon which the $10,000 in money was received, was so made with the understanding that it related to property belonging to the railroad company—in the other case the fact of placing the lands in dispute on the tax books, in the manner above indicated, and the fact that subsequent assessments of the lands were made, were unknown to the board of supervisors up to the year 1874. In the one case, there was no effort upon the part of the county to avoid the collection of taxes upon the land in suit; on the contrary, the claim was pushed until it resulted in a net gain to the county in a large sum of money—in the other case, as soon as the fact of taxation was discovered, steps were taken not to tax the lands, and instructions were given the county treasurer not to receive taxes on the lands. In the one case, no offer to return the taxes so collected was made by the county—in the other case there is an offer (abstract 99) to repay any and all taxes erroneously received by the county. In the one case, the railroad company paid the $10,000 in full of all taxes, without any notice of claim of title by the county—in the other, the railroad company knew that it was without any valid claim of title, and paid the taxes in the first instance without the knowledge of the board, and in the last with knowledge that the board had forbidden its receipt. In short, in the one case, the equities were with the railroad company, but in the other, they are all with the county.

Audubon County vs. *The American Emigrant Company*, 40

Iowa, 460, is the next of these cases, which we wish to bring under review. It is a suit of equity to set aside a contract for the sale of swamp lands, under sections 986 to 990, and the amendments thereto, and also the deeds made by the county, under the contract. The facts show that the contract was duly submitted to and approved by a vote of the people; and further that the grantees had agreed with the county to release the county from all liability to reclaim the lands, and that it would reclaim the same at its own expense. The contract was made and approved in 1862. The deeds were made afterwards, and from 1867 to the commencement of this suit the county had treated the Emigrant Co. as the owner of the lands, and had taxed the lands as its property, and had from year to year received taxes thereon. The judgment being for the county, the Emigrant Co. appealed. This court revised the judgment of the district court, holding that the contract was valid, it appearing as a fact that it was made under Rev. 986 *et seq.*, and the amendment thereto; and secondly, that the facts showed that the county had levied and collected taxes on the lands for several years following the satisfaction of the contract, and that the taxing and receipt of taxes worked an estoppel upon the county.

Without in this place assailing the soundness of the second point thus held, we pass at once to notice the difference of the facts of that case, and the one now in hearing. In the one case, there was a vote on the contract, and an unqualified approval of it—in the other case there was no vote until after the deeds were all delivered and recorded, and then the vote resulted in an entire repudiation of the whole business. In the one case the court say that it appears, without contradiction, that the county regularly assessed the lands in controversy to the Emigrant Company, and collected taxes thereon, regularly for eight years; in the other case there was originally neither

assessment nor levy, nor entry on the tax books by the county; nor were there any taxes received with the knowledge and approval of the board. In the one case the county had parted with its title to the lands—it had executed its trust respecting them—in the other, the county still held the lands *in trust*, though beclouded by the spurious deeds assailed in this action. In one case there was a lack of parties defendant, in this, that the grantees of the Emigrant Company were not made co-parties—in the other case all such parties are before the court. In the one case the equities wore with the Emigrant Company, but in the other they are all with the county.

Page County vs. *The B. & M. R. R. Co.*, 40 Iowa, 520, is the last in the list of the estoppel cases. It is a suit in equity to quiet the title to certain lands in the plaintiff as swamp lands. The defendant sets up title in itself, and alleges that plaintiff has sold and conveyed a part of the lands and has assessed and taxed others, and defendant has paid the taxes thereon whereby plaintiff is estopped to claim title therein. The opinion holds that the defendant has failed to make out a case of estoppel under the rule recognized in the Story county and Adams county cases.

The inference from this holding is, that every case must be determined by its own circumstances, and that where the favorable circumstances and the equities are wanting, the estoppel will not be generated. Hence should we admit for the purpose of argument only, that the rule in these cases is well founded, still we would insist that in the case now in hearing there is an entire failure to get within such rule.

But we submit that, if the rule thus announced goes to the extent that the officers of a *quasi* corporation, like the officers of a private corporation may, by their acts, create an estoppel

against the corporation, then it goes too far, and is opposed by principle and authority.

The State is not bound by an estoppel, nor is a grantee from the State estopped to deny what the State from whom he claims is at liberty to assert.

Candler vs. *Lunsford*, 4 Dev. & B. (N. C.) 407.

Wallace vs. *Maxwell*, 10 Irdell, 110.

Taylor vs. *Shafford*, 4 Hawks, 116.

The same doctrine is held in Maryland and many other States. Now the title and trust growing out of the swamp grant was first vested in the State of Iowa. The State may sustain the character of a trustee. It has legal capacity to take and execute trusts for every purpose. And if a State accepts a trust by grant, as in this case, it must act, through its legislative powers, in administering the trust, or in creating and performing its agencies in respect to the trust.

Perry on trust, section 41.

As a means of administering this trust, the State passed the trust property to the county. We have already seen that the county is but a local sub-division of the State, with powers and functions having reference to the State. Hence, whether we view the county as a grantee of the trust property, or as a part of the State, it follows, in either case, that a county is only bound when acting through its legislative powers. The trust property is not taxable. *Iowa Railroad Land Co.* vs. *Story Co. supra.* No county officer has the right to carry it on the asses-

ment. The board of supervisors cannot subject it to a tax levy. The auditor cannot place it on the tax books, either before or after the books are passed into the treasurer's hands. The treasurer cannot receive taxes thereon, nor can he sell and convey the trust estate for the non-payment of such taxes. Every one of these acts are *ultra vires*.

The case of *Gibson et al.* vs. *Howe et al.*, 37 Iowa, 168, fully supports this view of the law. That was a suit in equity to set aside and declare invalid certain tax deeds to land. The plaintiffs based their claim upon the following state of facts: In November, 1862, Clark county held a judgment against a defaulting officer. An execution was issued on this judgment and levied upon the land in suit, and at the Sheriff's sale the county itself became the purchaser, and received a certificate of purchase, showing the fact of purchase, and the right to a deed at the end of the year, if not redeemed. The year expired, and the county thus became entitled to a deed, but as a matter of fact, did not take a deed until 1967. Subsequently the county sold and conveyed the land to the plaintiff Gibson. The defendants base their claim on a tax deed, and show that the county taxed the lands for 1862-3-4-5-6, and in 1867 sold the land at tax sale for the unpaid taxes to the defendant Howe, and subsequently, in November, 1870, executed to Howe a treasurer's deed of the land. Now, it will be observed that for one year after the Sheriff's sale in 1862, the county had only a security in the land for the purchase price and interest. After that time, until the delivery of the Sheriff's deed, the county only had an equitable title in the land. The Sheriff's deed gave the county the legal title. The county then conveyed its title to Gibson. This court held that the plaintiffs were entitled to the relief sought, upon two grounds, one of which we quote:

"The property of a county, when devoted entirely to public

use, and not held for pecuniary profit, is exempt from taxation, Rev. 711. The land in question was not acquired for pecuniary profit, but to secure a debt due the county. It was not purchased or held to rent, or for its probable increase in value. It was acquired and held that the just amount due the county from a defaulting officer might be realized. This was the object to which it was devoted, and was undoubtedly a public use. It was not, therefore, taxable, while the county held the title, either legal or equitable thereto."

Now, we respectfully submit that upon the authority of this case alone, the judgment of the district court should be reversed. No principle of equity will permit a county to defeat a trust estate by taxing the land, and recovering the taxes from a stranger. The payment of these taxes was at the peril of the parties paying. The fact that the lands were not taxable, appeared of record. The acts of congress and of the general assembly charged all persons with notice of the fact that the lands were non-taxable lands, and that the county could not, if it would, lawfully tax them. But the facts in this case show that the supposed taxing of these lands was not the act of the county, but rather a compound of the acts of the Railroad company and of certain persons who happened at the time to be county officers.

The case of *Rossire* vs. *City of Boston*, 4 Allen, 57, holds that a city is not estopped from claiming lands which it owns, by the wrongful act of its assessors in taxing it to a person who had no title to or possession of the same, or by a collector's sale for non-payment of such taxes, and upon the ground that these officers, though elected by the city, are yet public officers, having their duties prescribed by law, for the general welfare, and being guided by the law in the exercise of their duties.

When city property is assessed by city officers and sold as individual property, this does not estop the city from setting up its title.

St. Louis vs. *German*, 29 Mo., 594.

Taxing lots as private property, whose boundaries include part of what is already used as a street, does not estop the city from claiming it as a street.

Ellsworth vs. *Grand Rapids*, 27 Mich., 133.

The case of *Marsh* vs. *Fulton County*, 10 Wall, 676, holds that county bonds, issued without authority, are invalid in the hands of an innocent purchaser, for the reason that the authority to contract must exist before any protection, as an innocent purchaser, can be claimed by the holder. In the course of the opinion, the court say: "Were the bonds valid when issued?" The answer depends upon the law of Illinois then in force. The clerk of the court possessed no general authority, to bind the county. He was a mere ministerial officer of the board of supervisors, and that body was equally destitute of any authority in this particular, except as the law of Illinois gave it. * * * This is not a case where the party executing the instruments possessed a general capacity to contract, and where the instruments might for such reason be taken without special inquiry into their validity. It is a case where the power to contract never existed—where the instrument might with equal authority have been issued by any other citizen of the county. It is a case, too, where the holder was bound to look to the action of the officers of the county, and ascertain whether the law had been so far followed by them as to justify the issue of the bonds. The authority to contract must exist before any protection as an innocent purchaser can be claimed by the holder. In the same

case it was insisted that the unauthorized act was subsequently ratified by the board of supervisors. But to this the court say that "the board had now power to issue the bonds in the first instance, without the previous sanction of the qualified voters of the county. The supervisors, in that particular, were the mere agents of the county. The power of ratification does not lie with the board. They could not ratify without a vote of the people, because they could not, in the first instance, make a subscription without such vote. It would be absurd to say that the supervisors could, without such vote of the people by simple expression of approval, or in some other indirect way, give validity to acts when they were directly in terms prohibited by the statute from doing those acts until after such vote is had."

In *The Mayor* vs. *Ray*, 19 Wall, 468, the court repeats the rule so clearly laid down in *Marsh* vs. *Fulton Co.*, *supra*, and applies the same to municipal corporations as follows: "When the power is clearly given, and securities have been issued in conformity therewith, they will stand on the same basis and be entitled to the same privileges as public securities, and commercial paper generally. But when the power has not been given, parties must take municipal orders, drafts, certificates, and other documents of the sort, at their peril. * * * * The face of the paper is notice to the holder that its validity depends upon the regularity of its issue. The officers of a city have no authority to issue it, for any illegal or improper purpose and their acts cannot create an estoppel against the city itself, its taxpayers or its people."

Thus the question of power to do the act lies at the foundation of all inquiry respecting the validity of the acts of both *quasi* and municipal corporations. This rule and the principle has a weighty bearing upon the case in hearing.

In *Railway* vs. *McShane*, 22 Wall, 440, it appeared that the U. P. R. R. Co. had earned the lands under the grant, but had not yet paid the costs of surveying the lands required by the act of congress, and consequently had not yet obtained the patent provided for in the granting act. Whilst the title was in this condition McShane and others, severally treasurers of different counties in Nebraska were about to collect taxes upon the lands. The action was to enjoin such collection, and the opinion holds that the State had no right to tax the land for which the cost of surveying had not been paid, and to which no patents had issued, for the reason that the title was still in the United States, and the taxing of the lands might result in defeating the government claim for the costs of survey and entry. The power to tax such property would imply the power to destroy a public right. The property and rights of the United States are no more exempt from the burdens and hazards of taxation than the property and rights of States and counties. Taxation in such cases is destruction. The act is *ultra vires*, and no estoppel is generated.

The case of *Farrish, et al.*, vs. *Coon, et al.*, 40 Cal., 33, is fully in accord with the doctrines of the supreme court of the United States, as found in the last three cases cited. It is worthy of the fullest consideration from this court, in its relations and bearings upon the case now in hearing.

The lands affected by the suit were tide lands, composing a part of the bay and harbor of the city of San Francisco, and as such belonged to the State by virtue of her sovereignty, and not by grant from the United States.

The legislature of California by act approved May 3, 1852, relating to the disposal of the 500,000 acre grant, authorized the issue and sale of school land warrants, which might be located

on any lands belonging to the United States, subject to location. The complainants, or those under whom they claim, purchased some of those warrants paying the purchase price into state treasury, and then located them upon the tide lands in suit. In pursuance of this location the surveyor general of the state and register of the United States, land office, set aside the tracts so located from the mass of the public lands and in satisfaction of so much of the 500,000 acre grant. The complainants entered possession of the tide lands so located and made valuable improvements thereon. The respondents as tide land commissions, appointed under a state statute, were about to sell the tide lands, or portions of them, and the action was to enjoin such sale, an injunction was granted, and a motion to dissolve the same being overruled, the respondents appeal. Upon very full argument, and after great consideration, the supreme court refused the judgment. The opinion in the case holds:

1st. That the location of the warrants on the tide lands was void, as against the true owner, and the entry of the locators under such locations, that of trespasses without authority of law.

2nd. That the state is not estopped from asserting the title to the lands, by the fact that the purchase money for the warrants was paid into the state treasury, and never refunded or offered to be refunded.

3d. That the purchasers of the warrants were bound to know that they could only be located on lands belonging to the United States.

4th. That the state is not bound to refrain from claiming

the lands, on which complainants, without the consent of the state, and in violation of law, located the warrants purchased from the state.

5th. That the tide lands were not the property of the United States, nor were they under the control of the register of the land office. Such register had no authority to set the same apart, nor had the surveyor general of the state any authority to approve such locations.

6th. That the acts of these officers in setting apart and approving such locations, were in excess of power and void, and that a contrary rule would place all the property of the state at the disposal of her ministerial agents, acting wholly without the authority of law, and beyond the scope of their powers.

The recent case of *Low* vs. *Lewis*, 46 Cal., 549, and the cases there cited, are also worthy of the respect and consideration of this court.

The property affected by that suit was one of the "city slip lots" in the city of San Francisco. It was sold in 1853 under what purported to be an ordinance of the city. Subsequent to this sale the city taxed the lot, and still later sold it for the unpaid taxes, and issued a tax deed to the purchaser. The sale of 1853 was adjudged void for the reason that the ordinance under which it was made was a nulity. After this the city again sold the lot, and the second purchaser brought ejectment, and the defendants, among other defenses, set up the tax deed of the city, as matter of estoppel. The opinion of the supreme court holds:

1st. That the lot when sold at tax sale was in fact the property of the city.

2nd. That the property of a municipal corporation is not subject to taxation for municipal purposes.

3rd. That a municipal corporation cannot tax its own property.

4th. That when the tax is illegal and void, a sale under such taxing is a nulity and the tax deed valueless and void.

The cases cited are *Hardenberg* vs. *Kidd*, 10 Cal., 402; *Fall* vs. *Marysville*, 19 Cal., 391; *Bucknell* vs. *Story*, 36 Cal., 67.

As already shown (see *Marsh* vs. *Fulton Co.;* The *Mayor* vs. *Ray*, and *Railway Company* vs. *McShane*, *supra.*) The rule as to power to contract and to tax is applicable alike to *quasi* and municipal corporations. Hence we submit that the California cases above cited have a decissive influence over the case in hearing.

The case of *Taylor* vs. *Miles*, 5 Kan., 498, 7 Am., 558, presents sharply the question "whether a tax deed, not void on ac-"count of some irregularity merely, but void because the tax "itself was not authorized, void because the land was not taxa-"ble, void because the state and county had no power to tax "the land, will when recorded, set the statute of limitations "running," and the opinion holds on the facts of the case that the lands were not taxable, and that the tax deed was absolutely void, and that the statute did not run in favor of the holder of such void deed. Especial attention is invited to this case.

Though relating to the subject of limitations, yet in its reosonings and citations, it constitutes a strong support for the doctrines for which we contend.

In *Knox* vs. *Cleveland*, 13 Wis., 246, the court, in discussing a similar question, held the following language:

"The general authority of the taxing officers and the liability of the land to taxation being conceded, all other questions are at an end. If either of them, (that is, the authority of the taxing officers, or the liability of the land to taxation,) were wanting, another question would be presented. It might then be urged that there was a defect of jurisdiction; that the sale was altogether unauthorized and void, and passed no title or color of title."

Mr. Blackwell, in his treatise on tax titles, (406) says: "The fact that the land is subject to taxation is the basis of the power to sell in case the owner proves delinquent. If the sovereign power of taxation has never attached to the land, or having legally attached, the land is exempted from the operation of the taxing power, then it cannot be sold. A sale under such circumstances is void, to all intents and purposes. In all cases, if the person taxed, or the subject matter of taxation, be not within the jurisdiction of the officer who makes the assessment, all subseqnent proceedings by mere ministerial officers, acting under a warrant, or other authority, to enforce the collection of the tax, are deemed utterly void, *the assessments being corrain non-judice.* The owner is not bound to enjoin the sale of his land under such circumstances, nor resort to his remedy against such officers, but may contest the validity of the sale whenever the purchaser, or his grantee, attempts to recover the possession or establish the title to the land."

The case of *Loan Association* vs. *Topeka*, 20, Wall, 655, holds that the fact that the town authorities paid one installment of interest, on bonds issued without authority of law, by the levy of a tax for that purpose, did not estop the town from denying the validity of the bond.

Bissell vs. *Kankakee*, 64, Ill., 246, 16 Am. 554, is a case where a municipal corporation, without express authority for so doing, issued bonds simply for the purpose of making a donation. The appellant became the purchaser of the bonds, without actual notice of the want of authority in the corporation to issue them. *Held*, by the supreme court, that the act of the corporation was *ultra vires*, and the bonds *void*, even in the hands of an innocent holder. In stating the rule as to statute or constructive notice in such cases, the court use this language: "The authority of a municipal corporation to issue bonds is derived from public laws; all the avenues to information in regard to the laws and ordinances of such corporation being open to public inspection, the holder of such securities will be presumed to have examined them and to have known whether or not the corporation had the requisite power to issue the bonds."

The rule thus stated is equally applicable to *quasi* corporations and to the case now under discussion.

The lands were non-taxable—so declared by the statutes and so enforced by the courts. Whoever paid taxes thereon, or bought the same at a tax sale, or took a deed thereon, did so with notice and at his own peril. Hence, we may appropriate the language of the supreme court of the United States in *The Mayor* vs. *Ray*, *supra*, and say, *that the officers of Mills county cannot by their unauthorized acts create an estoppel against the county.*

McCracken vs. *San Francisco*, 16 Cal. 591, is a case where contracts in excess of corporate powers, and *ultra vires* as a defence are fully considered. In its facts and holdings, so far as applicable to the present discussion, the case was this: By act approved March 26, 1851, the State granted to the city of San Francisco certain premises, upon certain conditions, and the city, by ordinance, accepted the grant. Subsequently the premises were dedicated, by ordinance, as a public dock. By ordinance No. 481, approved December 5, 1853, the council undertook to repeal this act of dedication, and to provide for the sale of the property. At the passrge of ordinance 481, the council consisted of eight aldermen, and the same number of assistant aldermen. By the charter a majorito vote of all the members elected to the board of aldermen and assistant aldermen was necessary to the passage of an ordinance. A vacancy, by resignation, existed in the assistant board, and at the vote, on ordinance 481, only four voted for it—being less than a majority. A sale of property took place, in pursuance of this supposed ordinance, at which plaintiff purchased a parcel of this property, and paid down $2,100, took a bond for a future conveyance, and afterwards, in 1854, received a deed from the city, and entered into, and still retained possession of the lot, at the commencement of the suit. The action was to recover from the city the purchase money—on the supposition that the title was still in the city, notwithstanding ordinance 481 and the deed of conveyance. The answer was a general denial. The judgment below was for the defendant. The plaintiff appealed. The supreme court reversed this judgment. Field, C. J., (now one of the justices of the supreme court of the United States,) delivered tor the court an exhaustive and unanswerable opinion, holding—(1) That ordinance 481, not having a majority of the entire board, was never passed, but was rejected by the council; (2) That the recognition in ordinance 493 of ordinance 481, and appropriation of $185,000

of the proceeds of the sale, and the further recognition by appropriating portions of such proceeds to the payment of the salaries of members and officers of the police, and to the payments of judgments against the city, and to the payments of debt to the State, were not such acts of adoption or approval of ordinance 481 as to give a validity to the sale; (3) That the mode of sale pointed out in the statute was restrictive, and no other mode could be followed; (4) That the city was not estopped from denying the sale under ordinace 481, and from asserting title to the propeety sold; 5) That the title of the city was unaffected by the sale, and the deed made in pursuance thereof, and that plantiff's possession was that of a trespasser—liable to ejectment at the suit of the city.

At the conclusion of the opinon, the court use this language: "We have gone over the positions taken by the defendant (the city), and in none of them do we find any valid objection to the claim of the plaintiff. We have considered them at great length from the fact that upon the decision of this case will depend, to some extent, the disposition of several other cases, which involves in the aggregate a little less than half a million. Be this as it may, it can have no weight in determining this case. It is our duty to pronounce the law. The sale of December, 1853, being void, no title passed. It still exists in the city and can at any time be taken possession of or be disposed of by the city. The plaintiff has recived no consideration for its money. The city is legally bound to refund it."

We invite especial attention to this case, and submit that it affords strong support to our view that the contract and deeds assailed are void, and that no title passed, and, if we right in this, then there is an end of all debate upon

the matter of estoppel by reason of the alleged taxing of the lands.

The City of St. Louis vs. *The Gas Companies*, 3d Cent. Law Journal, 92, is also a case where contracts in excess of corporate authority, and *ultra vires* as a defence, are discussed with great intelligence. Briefly, the case was this: On January 9, 1846, the city of St. Louis and the St. Louis Gas Light Company entered into a contract by which it was provided that the city might have the right to purchase the gas works on the 1st of January, 1870, and every five years thereafter. On February 26, 1869, the city resolved to purchase the gas works, and the next day notified the gas company of such resolution. On November 26, 1869, the city appointed appraisers to act in conjunction with appraisers to be appointed by the gas company, but the gas company refused to appoint such appraisers, and denied the city's right to purchase. On the 21st of June, 1870, the city instituted suit against the gas campany, to enforce its alleged right of purchase. Pending this suit, the city council passed an ordinance, and in accordance therewith a contract was entered into between the city and the gas company, by which it was stipulated, among other things, that the litigation between the city and the gas company should cease, and that all suits then pending should be considered as settled. The case was continued from time to time till August 5, 1875, when plaintiff filed its amended petition setting up the facts above indicated.

The petition farther alleged that said ordinance and contract were void as being *ultra vires* and without consideration and prayed the court to proceed to enforce said right of purchase and to take an account of the profits of the gas company from January 1, 1870, and to cause them to be paid over to the

city. An injunction was also asked and decree quieting the title in the city and for general relief. To the amended petition each of the defendants filed its demurrer presenting two questions.

1st. That the city had no right of purchase.

2d. That if it had, the contract of settlement of 1873 extinguished it. The demurrers were overruled. The opinion *holds*, (1). That the contract of 1846 is valid and binding, and the gas company is estopped from denying its validity. (2). That the city having in 1869 resolved to purchase, and having given the required notice thereby became entitled to the gas works, and acquired a vested right therein, and that said resolution took effect January 1, 1870, and that the charter of the gas company then expired. (3d). That the contract of settlement of 1873 was *ultra vires* and void. (4). That the petition on its face presents a cause of action and that the demurrers must be overruled.

Here it will be seen that the power of the gas company to contract and be contracted with expired on the 1st of January, 1870. For this cause the settlement contract of 1873 was void and constituted no defence to the action of the city, And so we say the St. Louis case is authority on this case. The contract of 1868 between the county and railroad company was void because it was in excess of the corporate authority of the county. The act was not only in excess of authority, but was expressly prohibited by the statute. Hence if the contract and deeds made in pursuance thereof, were in excess of authority, no title passed. The lands remained as before, non-taxable, and the supposed taxing could in no possible way generate an estoppel.

The People vs. *Brown et al.*, 66 Ill.,——2 Central Law Journal, 543, is a case where an auditor when applied to by sureties of a collector, gave them, through mistake, an incorrect statement of the collector's account, which prevented them from obtaining indemnity. *Held* that such mistake could not estop the State in a suit on the collector's bond, against such sureties, from recovering the true amount due State. Mr. Justice Breese for the court said: "As between the government and an individual we have found no case holding the former would be estopped by any statement of its officers from recovering its own. The State is not embraced within the statute of limitations unless specially named, and, by analogy, would not fall within the doctrine of estoppel. Its rights, revenue and property would be at fearful hazard should this doctrine be applicable to a State. A great and overshadowing public policy, of preserving these rights, revenues and property from injury and loss by the negligence of public officers forbids the application of the doctrine. If it can be applied in this case, when a comparatively small amount is involved, it must be applied when millions are involved, thus threatening the very existence of the government. The doctrine is well settled that no *laches* can be imputed to the government, and by the same reasoning which excuses it from *laches*, and on the same grounds, it should not be affected by the negligence or even willfulness of any of its officials."

The Iowa Falls & Sioux City R. W. Co. vs. *Cherokee Co.*, 37 Iowa, 483; same vs. *Woodbury Co.*, 38 Iowa, 498; and same vs. *Plymouth Co.*, 40 Iowa, 609, all hold that the lands therein referred to became taxable only after they had been conveyed by the governor's patent, and this holding seems to be on accord with *Railway* vs. *McShane*, *supra*.

We deem it unnecessary to pursue the discussion of taxation

and estoppel any further. We have shown, (1.) That the facts and circumstances of this case, take it entirely without the rule in the Story and Adams county cases; (2.) We have shown that the rule indicated in those cases, is not applicable to *quasi* corporations; (3.) We have shown that its application has been denied even by this court, in well considered and strongly supported cases; (4.) We have shown that the taxing of these lands was forbidden by our own statute; (5.) We have shown that the taxing of these lands has been denied by this court; (6.) We have shown from our own statute, from the decisions of this court, and of numerous other courts, State and Federal, that the alleged taxing was in excess of corporate power, and that no estoppel was thereby generated.

6th. There was error in the ruling of the court in permitting the question (Abstract 251,) to witness Angell, and in receiving in evidence his answer thereto.

1. The evidence being secondary, was incompetent. There was no offer of the tax books themselves. The list itself is simply the judgment of the witness as to what the tax books themselves show. He has no personal knowledge of anything stated in the book or how or by whom the same were made.

2. The List describes lands which are non-taxable, in the first instance, and there is no competent and satisfactory evidence that a valid sale thereof had been made by the county, so as to render them liable to taxation.

7th. There was error in the ruling of the court in permitting the question (Abstract 261,) to witness Wing, and in receiving in evidence his answer thereto.

The question and answer are clearly bad. (1.) That which

is called for and obtained is not the best evidence; (2.) The written instrument expressed the object and the witness should not have been permitted to testify at variance with the instrument,

8th. Errors committed by the court as indicated in assignments 6 to 12, inclusive, (Abstract 261-2.)

It will be seen from the abstract, that plaintiffs objections to these several questions, and answers were made at the original examination of the witnesses, and were renewed by motion before the trial began, and were never waived by the plaintiff. The agreement as to that portion offered in depositions, being stated on (Abstract 188,) and the objections, as to evidence offered orally, being stated, as shown in the several assignments of error.

As a matter of fact, the court did not indicate his views upon the evidence and the objections thereto. We cannot tell whether he received and regarded the matters objected to as evidence or not. We are simply told that our petition must be dismissed, and that we must pay the costs. In this state of the record, what are we to understand? If the court below allowed all the obnoxious questions and answers, and regarded them as evidence, then it committed manifold errors. If, on the other hand, the evidence and objections all pass to this court, subject o the examination and rulings of this court on the new trial, here given, then we cannot be so greatly prejudiced by the inaction of the court below. In any event, we wish it understood that we have not waived, and do not now waive, any one of the objections indicated in the abstract and assignment of errors. In respect to the tax deeds, referred to in the tenth assignment, we here refer to the objections detailed and entered of record on the trial (Abstract 264,) and to what we have said under

paragraph V. of this argument. We insist that the objections were well made, and that the tax deeds so offered were inadmissable as evidence; and the same is insisted upon in respect to the Lease and Exhibit "E" (Abstract, 265,) indicated in assigements 11 and 12.

9th. Error committed by the Court in not ruling, as indicated in assignment 13.

On the trial the court had power to detrmine, both as to the competency and sufficiency of the evidence. It was the right of any party to object to testimony offered by the adversary, and it was no less his right to have a ruling hereon. Each party to a suit is entitled to know upon what state of facts he can base his success, if successful, or to what state of facts he must attribute his defeat, if defeated.

With the foregoing review of the facts and application of authorities, we are content to submit the case.

MILLS COUNTY, Appellant,

by

C. B. LAWRENCE and

D. H. SOLOMON, its Attorneys.

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17-557

OFFICE SUPREME COURT U.S.
FILED
MAR 15 1883

The Supreme Court of the United States,

October Term, A. D. 1882.

ERROR TO THE SUPREME COURT OF IOWA.

MILLS COUNTY, IOWA, *Plaintiff in Error*,

191. *vs.* *IN EQUITY.*

THE BURLINGTON & MISSOURI RIVER R. R. CO., ET AL.

AND

MILLS COUNTY, IOWA, *Plaintiff in Error*,

192. *vs.*

THE CHICAGO, BURLINGTON & QUINCY R. R. CO.,

ADDITIONAL OR SUPPLEMENTAL BRIEF AND MORE PARTICULAR AND SPECIFIC ASSIGNMENT OF ERRORS.

On behalf of Mills County,

By

D. H. SOLOMON, of Counsel for Mills County.

B. F. WALKER & CO., PRINTERS, COUNCIL BLUFFS, IOWA.

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In order to enable the court and opposing counsel to see more readily some of the points upon which the plaintiff intends to ask a reversal, the plaintiff here makes in lieu of the second error in the former assignment the following more particular and specific assignment and asks that the same may be considered and treated as plaintiff's second error in its assignment of errors:

2d. The decree of the court below is contrary to law, to State statutes, and to Federal statutes and Federal authority, and in this:

a. It violates the trust conferred in the act of congress entitled, "An Act to enable the State of Arkansas and Other States to Reclaim the Swamp Land Within their Limits." *Approved Sept. 28th, 1850.*

Together with another act of congress which is entitled, "An Act to Confirm to the Several States, the Swamp and Overflowed Lands Selected Under the Act of September 28th, 1850, and the Act of the 2d of March, 1849." *Approved March 3d, 1857.*

b. An act of the General Assembly of the State of Iowa, which is entitled, "An Act to Dispose of the Swamp and Overflowed Lands in the State of Iowa, and to Pay the Expenses of Selecting and Surveying the same." *Approved February 2d, 1853.*

Together with an act of the General Assembly of Iowa entitled, "An Act to Authorize the Counties to Use the Swamp Lands to aid in Construction of Railroads and Seminary Build-

ings, passed March 22d, 1858, and which took Effect *April 21st, 1858.*"

Sections 986, 987 and 988 thereof.

Also an act of the General Assembly of the State of Iowa, entitled, "An Act to Amend Section 986 of the Revision of 1860, in Relation to Swamp Lands." Each of which acts were offered in evidence by plaintiff in error by their respective titles. (See printed record in case No. 191, pages 80 and 81; marginal.)

c. The judgment and decree of the Supreme Court of the United States in case No. 39, rendered at the December term, 1869, in the case entitled,

The Burlington & Missouri River R. R. Co.,
Plaintiff in Error,
vs.
Mills County,

In error to the Supreme Court of the State of Iowa, offered in evidence in the court below and to be found in the record of case No. 191 on pages 106–7–8. (Marginal.)

ADDITIONAL ARGUMENT.

I.

This court has jurisdiction.

The act of congress Setember 28th, 1850, referred to in the foregoing assignment, granted the whole of the swamp and over-flowed lands to the several states within which they were situated to enable them to construct the necessary levees and drains to re-claim such lands therein, and further provided in the second section "that the fee simple to said lands shall vest in such states subject to the disposal of the legislature thereof." And further, that "the proceeds of said lands, whether from sale or by direct appropriation in kind, shall be applied *exclusively*, as far as necessary, to the purpose of reclaiming said lands by means of the levees and drains aforesaid."

The State of Iowa accepted this grant and the trust imposed and through its legislature adopted a scheme for executing it.

By the act of the 2d of February, 1853, referred to in the foregoing assignment, it is provided, "That all the swamp and over-flowed lands granted to the State of Iowa by the act of congress (September 28th, 1850,) be, and the same are, hereby granted to the counties respectively in which the same may lie or be situated, for the purpose of constructing the necessary levees and drains to reclaim the same; and the *balance* of said lands, if any there be, after the same are reclaimed as aforesaid shall be applied * * *."

The manner of the application of the *balance* of said lands and the proceeds as provided for in this act is here omitted, and for

the reason that by acts of that legislature supplemental to this, other and different provisions were adopted.

By the act of March 22d, 1858, referred to in the foregoing assignment, sections 986, 987 and 988 of the revision of 1860, the following provisions were made which were in force and constituted the law of the case at the date of the alleged contract. And likewise at the date of the vote which was taken upon that proposition at an election called for that purpose by the people of Mills county, held on the 10th day October, 1871. (See record page 78.)

Said section 986 having been amended by chapter 77 the laws of 1862, which amendment took effect April 3d, 1862, we here substitute that amendment for said section 986 and print, for the convenience of the court, that statute as amended, showing the plan adopted by the Iowa legislature and the law in force at the date of these transactions which provided for the execution of the Federal trust.

Be it Enacted, &c.:

Sec. 986 (as amended). "That it shall be competent and lawful for the counties owning swamp and over-flowed lands to devote the same, or the proceeds thereof, either in whole or in part to the erection of public buildings for the purpose of education, the building of bridges, roads and highways for public institutions of learning, or for a permanent school fund, for the use of the county to which such lands belong, or for building county buildings, or for making railroads through the county or counties to which such lands belong; *provided*, that before any of said lands or the proceeds thereof shall be so devoted to any of the purposes aforesaid the question whether the same shall be so done shall be submitted at some general or special election

to the people of the county; [and for that purpose the boards of supervisors are hereby authorized to call a special election if properly petitioned for by the legal voters of the county]; *provided always*, that no county is hereby released from its obligations to make the necessary drains and levees contemplated by act of congress passed September 28, 1850, and the act of the general assembly of this State, passed January 13, 1853.

Sec. 987 (2). The proper officer or officers of any county may contract with any person or company for the transfer and conveyance of said swamp or over-flowed lands, or the proceeds thereof, or otherwise appropriate the same to such person or company, or to their use, for the purpose of aiding or carrying out any of the objects mentioned in the first section of this act, which said contract shall be reduced to writing and signed by the respective parties or their lawful au horized agents.

Sec. 988. (3). Before such contract shall be of any *force* or *validity* the same shall be published for four weeks, immediately preceeding some general or special election, in some newspaper published in the county, and if there be none published therein, then three copies of the same shall be posted in three of the most public places in each township in the county for the length of time aforesaid, together with a proclamation of the proper officers and directing how and where the vote thereon shall be taken, and returns made and canvassed, and in what manner or form the people shall vote thereon, and if it shall appear that a majority of the people, in any county voting thereon are in favor of the contract or proposition submitted to them, then and in that case such contract or proposition shall be binding upon the parties thereto; but if the *majority* of the people voting on such proposition are *against* the same, then it *shall be null and void;* provided that *no sale contract or other disposition* of said swamp or over-flowed lands *shall be valid*,

unless the person or company to whom the same are sold, contracted or otherwise disposed of, shall take the same subject to all the provisions of the acts of congress of September 28, 1850, and shall expressly release the State of Iowa and the county in which the lands are situated, from all liability for reclaiming said land."

This court has held that :

2. "A grant, subject to the conditions of that act (September 28, 1850) made by a State of its swamp and over-flowed lands to the several counties in which they are situated, to be disposed of for general county purposes, is valid, and the county which has disposed of them in *pursuance* of the State grant cannot rescind its contract on the ground of its being a violation of the (said) act of congress."

3. "In Iowa, such a contract, if *approved by a vote of the people* of the county under the act of the legislature of that State passed in 1858, (which is the one above quoted), is valid."

Emigrant Company vs. *Adams Co.*, 100 United States, 61.

We submit that the disposition made of the lands in controversy was not only *not in pursuance* of the State grant but was in flagrant violation of the same.

In this case the arrangement was emphatically disapproved of by the people of Mills county on a popular vote.

(See pages 78 and 79 of record).

And that while it may hardly be admissible to treat that Iowa statute as a *Federal statute*, still we do claim that it is based upon, and shall be treated in this discussion as Federal

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And that while it may hardly be admissible to treat that Iowa statute as a *Federal statute*, still we do claim that it is based upon, and shall be treated in this discussion as Federal

authority, under section 709 of the revised statute, since it is the means adopted by the legislature of Iowa, the trustee named in the Federal grant to execute the trust imposed thereby. And that a violation of its terms and provisions by a denial of rights claimed under the same does present a Federal question, and one over which this court has jurisdiction, any construction given to the State statute by the Supreme Court of Iowa to the contrary notwithstanding, and *because* of such construction.

Insurance Company vs. *Treasurer*, 11 Wall., 208.

Commercial Bank vs. *Rochester*, 15 Wall., 642.

And not only this, but the *vote of the people* was the *exercise* of *Federal authority*.

In that case of *Emigrant Company* vs. *Adams Co.*, this court held also :

1. Though the grant by the act of congress of September 28, 1850, (9 Stat. 519), of the swamp and over-flowed lands to the States in which they lie, is declared to be made for the exclusive purpose of enabling such States, with the proceeds thereof, to reclaim the lands by means of levees and drains, it is questionable whether the security for the due application of the proceeds does not wholly rest upon the good faith of the several States, and whether they may not exercise their discretion in this behalf without being liable to be called to account, and without affecting the title to the lands; at all events, it seems that congress alone has the power in a clear case of violation of the trust to enforce the conditions of the grant, by revocation or otherwise, and since, by the act, the proceeds are to be applied to the designated purposes only "as

far as necessary," each State has, at least, a large discretion as to the "necessity" of employing the proceeds to the reclamation of the lands.

The good faith of the State of Iowa as a trustee is not questioned. The State has recognized the fact that a *disretion* has been confided to it, and it has delegated and chosen the people of each county in their primary capacity at the ballot box, whose knowledge and interest fit them alike and above all others for the proper exercise of that discretion, to do it. And while congress alone may have the power to enforce the conditions of the grant, there is no call in this case for the exercise of such a power for there has been no violation of the trust on the part of the Iowa legislature.

The object of the Iowa statute evidently was to make no diversion of the fund so long as it should be needed for the purpose of draining and reclaimind, and this question was wisely left to the people who were to be affected by it, and a fair interpretation of their vote is that it determines that the lands and their proceeds are needed for drainage and reclaiming, and no stronger allegation or proof of that fact could be made and the record contains both.

The county of Mills could under the law assent to the proposition in but one way only, and when permitted to speak in that way; she dissented by a large majority.

The Federal courts have jurisdiction for the enforcement of trusts, which arise out of rights and duties under the constitution and laws of the United States.

Irvin vs. *Marshall*, 20 How., 558.

II.

The alleged contract, a copy of which will be found in the statement of the case which is prefixed to our original argument on pages v, vi, vii, purports to be the compromise of a suit.

The suit referred to was a suit in equity wherein Mills county, Iowa, was plaintiff and the Burlington & Missour River R. R. Co. was defendant.

The matter in controvery in that suit was the question whether the lands were swamp lands belonging to Mills county, and they were the identical lands which are in controversy in this action.

A decree had been rendered therein in the District Court of Iowa, in and for Mills county; declaring those lands to be swamp lands.

This decree was rendered April 17, 1866, and will be found on page 14 of the record. From this decree an appeal had been taken by this defendant to the Supreme Court of Iowa, and a decree of affirmance rendered by that court at its June term, 1867. (For a copy of this decree see page 105 of the record. That case was removed on writ of error to this court and docketed here December 7, 1867.

The date of this alleged compromise was the 13th day of July, 1868, and about seven months after the case had been docketed here.

That cause was docketed in this court as No. 39.

On the 7th of February, 1870, this court rendered judgment, by the opinion delivered by Justice Nelson, as follows, to-wit :

"This is a writ of error to the Supreme Court of the State of Iowa. The pleadings and proofs present the same questions involved in the case of the plaintiff against Fremont county and must be disposed of in the same way. The decree of the court below is affirmed."

And on the same day the following judgment was rendered and docket entry made to-wit :

"This cause came on to be head on the transcript of the record from the Supreme Court of the State of Iowa, and was *argued* by *counsel*. On consideration whereof it is now here ordered, adjudged, and decreed, by this court that the decree of the said Supreme Court in this cause be and the same is hereby affirmed, with costs."

7th February, 1870. (See record pase 107).

This judgment is a verty and cannot be disputed, and is conclusive of the fact that the lands were and are swamp lands, and the right set up is claimed under this judgment of this court, but the decision below herein is adverse thereto, so the writ of error lies under the revised statute, section 709. This former judgment of this court is Federal authority.

Dupasseur vs. *Rocherau*, 21 Wall., 130

The court below held that, "An adjudication in the District and Supreme Courts of the state that the lands were swamp, was *not conclusive* of the fact pending the decision of the Supreme Court of the United States to which the case had been

appealed." That court seems to have acted upon the theory that their judgment and decree was no longer in force as such, after the case had been removed to this court on writ of error.

But a writ of error to this court does not vacate the judgment below. That remains in force until reversed.

Railway Company v. *Townly*, 100 U. S., page 81. Opinion by Chief Justice Waite.

Besides, this court will please note that the date of the judgment by this court in that former case is February 7th, 1870, more than seven years prior to the date of the decree complained of herein by the Iowa Supreme Court which bears date October 19th, 1877.

The court below in this case held further that

"A county possesses the power through its proper officers to compromise pending litiga ion, involving the title to its swamp lands, and it cannot afterwards set up the fact, in order to defeat the compromise, that the lands in controversy were swamp, and that it therefore had no power to convey them as provided by the terms of the compromise."

And this, notwithstanding the fact that it was alleged and proved in the record then before them, that the alleged compromise was between the parties to that former action *in equity*, and that they had made this alleged agreement in regard to the subject matter in controversy in that suit, it being trust property, in direct disregard and contrvention of its own former decree therein, declaring as between those parties, the trust character of the property and the right of the

trustee thereto as against the opposite party. This could not be done without the sanction of the court *before* decree, and much less after decree rendered.

III.

Two records, or rather duplicate records, have been printed by the clerk of this court in the cases No. 191 and 192. These records are identical with the single exception that in the record of case No. 191, the proceedings of the court below in the equity case, that of

Mills County, Iowa,
vs.
The B. & M. R. R. Co., et al.,

is printed first and that of the other case, to-wit:

The Chicago, Burlington & Quincy R. R.
vs.
Mills County,

follows, beginning on page 145 (213 marginal).

These cases in both the District and Supreme Courts were consolidated and united together, and that union and consolidation should continue here and the cases be submitted together, since they are in fact and virtually but one and the same case.

On the 17th day of September, 1875, the defendant filed in the District Court of Mills county a motion setting forth "that there were two actions pending herein which might have been joined, viz: No. 817, equity, wherein Mills County, Iowa, is

plaintiff, and the Burlington & Missouri River Railroad Com pany, the Chicago, Burlington & Quincy Railroad Company and others, were defendants, and this cause, law, No. 92 Wherefore said Mills County moved that the Chicago, Burling ton & Quincy Railroad Company show cause why said No. 92 law, should not be consolidated with said No. 817, equity, an in support of said motion reference was duly made to the recor in each of said cases then pending in said District Court; and

On the 20th day of September, 1875, defendant, Mills County filed a motion to transfer this action to equity side of the cour and as grounds of such motion suggested that the answer here in sets up an equitable defense which this court can only deter mine by sitting as a court of equity, and further asking that thi cause be consolidated with No. 817 and that this motion be con sidered in connection with the motion to consolidate filed here tofore, on the 17th of September, 1875.

And afterwards, said motions to consolidate and transfer cam up for hearing, and the court, after argument on the same, mad ruling and order in the words following, to-wit: "Now, on thi day this cause comes on to be heard, and on the motion of de fendant to require the plaintiff to show cause why this caus should not be consolidated with the cause No. 817, on the equity calender, wherein this defendant is plaintiff and the B. & M. R R. Co., and others are defendants, and said motion being con sidered by the court, and no good reason being shown why such consolidation should not be made, it is ordered that this cause be consolidated with said case No. 817, on the equity calendar To all which which plaintiff excepts." See page———of rec ord.

And again the following document was filed in the Supreme Court at the March term, 1877, found on pages 274-5, marginal

"*In the Supreme Court of Iowa, March Therm, 1877.*

Mills County, Iowa, Appellant,

vs.

The C., B. & Q. R. R. Co., The B. & M. R. R. Co., et al., Appellees.

D. H. Solomon, L. W. Ross, and C. B. Lawrence for appellant.

O. H. Browning, J. M. Walker, and Hale, Stone & Proudfit for appellees.

Amendment to abstract by appellees.

Since the cases numbered 6599 and 6603 have been pending in this count the parties in each have filed herein a stipulation as follows:

"It is agreed that said causes (6599 and 6603) shall be consolidated, and that, for suce purpose counsel on both sides may use in common the abstracts of pleadings and evidence in both cases.

Again the Supreme Court of the State of Iowa says:

"The action first above named [191 here] was brought to set aside certain deeds executed by the plaintiff, Mills county, to the defendant, the Burlington & Missouri R. R. Co. The Chicago Burlington & Quincy R. R. Co. are made defendant as claiming title through the Burlington & Missouri River R. R. Co."

"The action last above named was brought by the Chicago Burlington & Quincy R. R. C. to recover of Mills county the

sum of ten thousand dollars. Both claims originated in the same transaction and the two cases are submitted together."

See page 17 of the opinion of that court hereto attached reprinted in full.

And the judgment and decree of the Iowa Supreme Court is final as much so in the one case as in the other. The defense in the suit at law 192 was an equitable answer setting up as a defense thereto the same subject matter that is affirmatively presented as the ground of recovery in the other case (191) and the issues joined upon such answer are identical with those in case No. 191 and the judgment and decree was simply an order in effect, stricking out that answer and as it virtuallally ended the cause, it leaves the action undefended and confers the right to an immediate judgment. It is therefore reviewable on writ of error as a final judgment.

Fuller v *Claffin*, 93 U. S., 14.

When by any direction the entire cause is determined, the decision when reduced to form and entered on the record constitutes a final judgment or decree, whatever may be its technical designation.

Commissioners v *Lucas*, 93 U. S., 108.

With this, together with our original argument the case is hereby submitted, on the part of the plaintiff in error.

D. H. SOLOMON.

of Counsel for Mills County.

APPEAL FROM MILLS DISTRICT COURT.

FRIDAY, OCTOBER 19.

The action first above named was brought to set aside certain deeds executed by the plaintiff, Mills county, to the defendant, the Burlington & Missouri River R. Co. The Chicago, Burlington & Quincy R. Co. and others are made defendants as claiming title through the Burlington & Missouri River R. Co.

The action last above named was brought by the Chicago, Burlington & Quincy R. Co., to recover of Mills county the sum of ten thousand dollars. Both claims originated in the same transaction, and the two cases are submitted together. Between Mills county and B. & M. River R. Co. a controversy arose in regard to the title to certain land. This controversy after considerable litigation was finally terminated by an agreement whereby the railroad company relinquished its claim to a portion of the land, and the county conveyed to the company the remainder and agreed to give the company the sum of ten thousand dollars. The question in the case is as to the validity of the agreement, and the conveyance made in pursuance thereof. Its validity is denied by the county and asserted by the two said companies. The land in controvery was claimed by the county as swamp land under the act of congress approved September 28, 1850. It was claimed by the B. & M. River R. Co., under the act of congress granting certain land to aid in the construction of railroads, approved May 15, 1856. The amount involved is about 23.316 acres. An action was brought by the county in the District Court of that county against the B. & M. River R. Co., to quiet its title to the land. A decision favorable to the

county was obtained in the District Court and affirmed in this court. An appeal was then taken by the defendant to the Supreme Court of the United States. It was while the appeal was pending in that court that the said agreement for a settlement was made. The agreement was also at that time partially executed. The land to be conveyed by the county was conveyed, but the money which was to be paid has not been paid. The county avers in substance, in its petition in the one case, as ground for canceling its conveyances, and in its answer in the other case, as ground of its non-liability for the money claimed, that the agreement for a settlement was obtained by fraud; that it was *ultra vires*, and was without consideration. The agreement is in these words: "In order to settle and finally adjust the lawsuit now pending in the Supreme Court of the United States, wherein Mills county, in the State of Iowa, is plaintiff, and the Burlington & Missouri River Railroad Company is defendant, and secure the completion of said road through Mills county by the way of Glenwood, in said county, we, the authorized agents of said county, submit the following proposition to the board of directors of said railroad company, to-wit: There are in dispute between the parties to said lawsuit twenty-three thousand three hundred and sixteen acres. For the purpose of having our proposition understood, we acknowledge that we owe you acres of land to the amount of 23,316. To pay which we have and offer you odd sections vacant (most of which is a part of the 23,316 acres) and even sections patented to the county and unsold, in the aggregate 9,080 acres; balance of the land due you, 14,236 acres. For further payment we have and offer you of the odd sections, about all of which is of the 23,316 acres claimed by you subject to pre-emption made through the county, acres to the amount of (on which nothing has been paid to the county,) 4,660. Of these pre-empted lands we estimate that about one-half of the pre-emptions are fraudulent and ought not to be recognized, but the county must ask that where *bona fide*

improvements have been made on the same the pre-emptors must be secured in their right to the same, and have the privilege of purchasing at $1.25 per acre of the county or company, which amount shall in any event go to the company. Now, you will have land for land, subject only to the pre-emptors' claims, until there will be due you in acres 9,576. The remainder, 9,576 acres, belong to *bona fide* settlers and purchasers, who, we must insist, shall be protected by the county. And as we have paid you all the land we have we offer for this balance ten thousand dollars in money. The company should understand that the balance of 9,576 acres is the land, portions of which it has been settling with our individual citizens for, and there is included in this 9,576 acres all the lands the company has sold to citizens and settlers at $1.25 per acre. With this understanding the $10,000 we offer you will be for just as much less than 9,576 acres as the company has thus sold, and, therefore, our pay would perhaps amount to $1.50 or more.

"It is understood that the suit now pending shall be continued by agreement of parties from term to term until the conditions of the contract or proposition shall have been complied with.

"It is also further understood that the foregoing proposition shall not be binding on the county of Mills unless said railroad company shall complete said railroad through Mills county *via* Glenwood, and build a depot at Glenwood, in that county, and in case said railroad company shall fail or neglect to build said railroad through Mills county by the way of Glenwood, and also to build and establish a depot at Glenwood, in said county, then in that event the said lawsuit shall stand for final hearing in the Supreme Court of the United States the same as if this proposition had never been made. In case the suit shall be settled on the basis of this proposition, each party shall pay their own costs. The manner of transferring the land, whether the county

shall deal with the purchasers or pre-emptors, or whether the railroad company under the restrictions indicated, the county is not particular about, but will agree to what may seem most practicable. The amount in acres, as stated above, may not be exactly correct, and probably is not, but it is believed to be nearly so, but we wish it understood that the company shall have all the swamp lands the county now holds, or is entitled to, in Mills county, Iowa, subject only to the conditions indicated in the foregoing.

"Witness our hands this July 13, 1868.

(Signed) "WM. HALE," and others,
"*Committee.*"

This proposition was accepted by the company and ratified by the board of supervisors of the county. Other facts are stated in the opinion. Judgment for the defendant in each case. The plaintiff in each case appeals.

D. H. Solomon, *C. B. Lawrence*, and *Lewis W. Ross*, for the County.

Hale, Stone & Proudfit, *O. H. Browning*, *J. M. Walker*, and *Kelley Bros.*, for the Railroad Companies.

ADAMS, J.—These cases have been presented with the learning and ability commensurate with their importance. The questions involved may be considered first as to whether the county had the power to make the compromise agreement; and second, if it had such power, whether the agreement is void by reason of fraud on the part of the Burlington & Missouri River Railroad Company, or for want of consideration.

The first proposition made by the county is that the lands were in fact swamp lands. Having established this proposition, as it claims, it maintains that the county could not under the statutes then in force, devote the lands to the making of a railway through the county unless authorized by a vote of the people of the county; that by the agreement in question the lands were devoted to the making of a railroad through the county, and that the same was not authorized by a vote of the people of the county.

It appears to us that if the county had the power to make a compromise, and if the agreement in question was a compromise, the county cannot now be heard to say that the land was swamp land, and that the county could not for that reason make the agreement in question. As to whether the land was swamp land was the very question in issue. That is precisely what the parties agreed not to test in the court of ultimate resort. It is not, therefore, for us to say that the land was swamp land. The fact that it was so held by this court was not conclusive. The question was still an open one, and the agreement for a settlement made while the case was pending in the Supreme Court of the United States was virtually an agreement that the question

should remain an open one forever. Most certainly the county cannot be permitted, after having abtained an agreement from the company to waive its right to ask the Federal Supreme Court to correct the error in this court, to insist in this court that the very ruling complained of was correct. As between the parties, then, to that agreement, if the county had the power to make a compromise, and if that agreement was a compromise, this court will not hold that the land was swamp land.

We come next to consider the question as to whether the county had the power to make a compromise. That the county had such power we think was substantially held in *Allen* v. *Cerro Gordo County*, 34 Iowa, 54, and in *Grimes* v. *Hamilton County*, 37 Iowa, 298. In the latter case it was held that an action brought to recover for services in securing the title to swamp lands might be compromised by the defendant county by a conveyance of a portion of the land.

It is claimed, however, that where a county is a party to an action involving the question of title to swamp lands, or lands alleged to be swamp lands, the county has no power to compromise such action. It is said that the county holds such land in trust, and that a trustee must assume the validity of the title to the trust property and act accordingly. But a trustee, in the exercise of a reasonable discretion, may certainly compromise debts. *Blue* v. *Marshall*, 3 P. Wms., 381; *Radcliffe* v. *Winch*, 17 Beav., 216. And we have no doubt that in the exercise of such discretion he may compromise any action whatever. A municipal corporation may compromise claims. *Augusta* v. *Leadbeater*, 16 Maine, 45; *Bean* v. *Jay*, 23 Maine, 117; *Petersburg* v. *Mappin*, 14 Ill., 193.

The general power of the county to compromise even where a question of title to alleged swamp lands is involved does not,

indeed, seem to be very seriously denied by the counsel for the County. They insist mainly that such power could not be exercised under the peculiar circumstances of this case. Great stress is laid upon the fact that at the time of the compromise there had been an adjudication in favor of the county, not only by the District Court, but by this court. So long, however, as the action was still pending, it was as much the proper subject of compromise as if no decision had been made.

Another objection taken is that the agreement was not a compromise. It is said that it was a total surrender by the county to the claims of the company. But the county did not agree to convey to the company all the land which the company claimed. It expressly excepted 9,576 acres. This would show, of course, that the agreement was a compromise were it not for the fact that the county agreed to pay the company ten thousand dollars.

The land excepted, it appears, had been conveyed to settlers. The county was anxious to protect them. It became necessary, therefore, to reserve in the settlement the land which had been sold them. Instead of this land the county offered to give the company ten thousand dollars. The precise language used is as follows: "We offer you for this balance (the 9,576 acres) ten thousand dollars in money." The fact that the land claimed by the company was not all conveyed to the company would not show a compromise if it was understood by the parties that ten thousand dollars was the value of the land excepted. The proposition as made by the county was nominally based upon the theory that that was the value, but there is nothing to show that such was the real understanding of the parties. It is easy to suppose that both parties knew well that the land excepted was worth more than ten thousand dollars. Before we should be justified in setting aside the agreement upon the ground that the company

obtained all that it claimed—the identical lands in part, and for the remainder an equivalent—the county should salisfy us that such was the fact.

And even then we should have to inquire further, and determine whether some valuable consideration did not move to the county by which the agreement could be supported as a compromise. The surrender of the whole of a disputed claim is not the less a compromise if something is paid for the surrender. In this case we find that the company agreed to build its railroad through the county by the way of Glenwood, and establish a depot at Glenwood. Whether the county could devote swamp lands, or not, to the building of a railroad without a vote of the people, might compromise a *disputed claim* for swamp lands in consideration of the building of a railroad without a vote of the people. Before we could hold that such an agreement is prohibited, we should need to ascertain and determine that the claim in question was a valid one. But the county, as we have seen, cannot ask such a determination because it has agreed for a consideration that the question shall remain undetermined.

This brings us to consider another position taken by the county, and that is that what the company agreed to do was no consideration, because it only agreed to do what it was under a necessity of doing before the agreement was made. By the act of Congress of May 15, 1856, the land granted was to aid in the construction of a railroad "running from Burlington on the Mississippi river to a point on the Missouri river near the mouth of the Platte river." Mills county is on the Missouri, and the mouth of the Platte river is opposite the county. It is claimed, and perhaps properly, that the road could not terminate near the mouth of the Platte river without running through Mills county. Did the company, then, do anything which it was not under a previous necessity of doing? It agreed to build its road by the

way of Glenwood, and we think it might have built its road by some other way. It is true the road had been surveyed by the way of Glenwood, and a map of the survey had been duly filed. The route, we think, had been "definitely fixed" within the meaning of the act of Congress making the grant. Whether after that any substantial change could be made in the route, we need not determine. Slight variations might be made. Sec. 6, Chap. 1, Extra Session, Laws 1856. Possibly only such could be made as should be demanded by proper engineering. But if only such could be made, we cannot say that the company was under the necessity of running by the way of Glenwood. What the facts are in that respect the record does not disclose. Possibly the road could have been run some other way with less expense, and that too without any substantial change of route. As between these parties, we think the presumption is that the company was not under the necessity of building its road by the way of Glenwood. The county took pains to stipulate for such location. If it was stipulating for the inevitable, it is for the county to show it. We are of the opinion that the county has failed to produce the requisite evidence in this respect.

In addition to the location of the road by Glenwood, the company agreed to establish a depot at Glenwood. This may have been of no benefit to the county, but as the county stipulated for it we think that we must presume that it was. Besides, the company agreed to pay one-half of the costs in the suit, and this alone was a consideration.

The fraud alleged to have been practiced upon the county by the company is said to have consisted in certain statements, and in certain acts. Considerable testimony was introduced for the purpose of showing statements made by mere employes of the company to certain individuals. In our opinion, such evidence is not entitled to any weight. The statements more especially

relied upon as frudulent were those of the president of the company, made to a prominent citizen, and former officer of the county. The statements were that "he did not know whether the road would go through Mills county; that the company hated to run a road through the county when the people were fighting them." If we should conclude that the president did not know that the company would run its road through Mills county, it would be for the reason that he must have known that the company could not legally run its road elsewhere, and we should be obliged to conclude that the county knew it for the same reason. We are of the opinion that the evidence fails to show any such statemnents on the part of the officers of the company, or any persons authorized to speak for the company, as would justify us in setting aside the agreement on the ground that the statements were fraudulent.

The frudulent acts relied upon consisted in running what the counsel for the county call "scare lines." Upon this point we think it may be said that if the company had a legal right to run its road upon those lines the evidence is insufficient to show that they were run as "scare lines." If it had no legal right to run its road there, the county was not justified in being scared. We see nothing, then, in what was said or done, which appears to us to amount to fraud.

We have assumed thus far that the agreement for a compromise was not abandoned by the company, but was carried out on its part. But the county contends that it was abandoned. To show that it was, the county put in evidence the docket entry of the Supreme Court of the United States made in the case in which the alleged compromise was made, which entry shows in effect that the case came on to be heard, and was argued by counsel, and that the decree of the Supreme Court of Iowa was affirmed. To rebut that evidence, the company introduced the

testimony of the attorneys of the defendant company in that case. From it, it appears that nothing was done by the attorneys of the defendant company in that case in the Supreme Court of the United States, except to file printed briefs, and that if they were filed after the compromise was made they were filed in ignorance of the compromise. The counsel for the company did not appear personally in court. One of them, speaking of the compromise, says: "No attention was thereafter given by counsel for defendant to the case, as the matter was supposed to be compromised."

Properly, of course, the appeal should have been dismissed, but that was neglected. The briefs which were filed remained on file. When the case was called, the court doubtless regarded it as for submission. But we see nothing in this which satisfies us that the company abandoned the compromise, or that either party did anything upon the supposition that the compromise had been abandoned.

The judgment of the court below in the case of *Mills County* v. *The Burlington & Missouri River R. Co. et al.* must be affirmed, and the judgment in the case of *The Chicago, Burlington & Quincy R. Co.* v. *Mills County* must be

REVERSED.

See comments of Judge Lawrence upon this opinion. (Original argument, pages 113 to 133, inclusive.)

17-557

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1882.

No. 191. In Equity.

MILLS COUNTY, IOWA,

vs.

THE BURLINGTON AND MISSOURI RIVER RAILROAD CO. ET ALS.

ERROR TO THE SUPREME COURT OF IOWA.

No. 192. At Law.

THE CHICAGO, BURLINGTON AND QUINCY RAILROAD CO.

als.

MILLS COUNTY, IOWA.

ARGUMENT AND BRIEF FOR DEFENDANTS IN ERROR,

By SHELLABARGER & WILSON,
Of Counsel for Defendant.

Thomas McGill & Co., Law Printers, Washington, D. C.

IN THE

Supreme Court of the United States.

No. 191. In Equity.

MILLS COUNTY, IOWA, Plaintiff in Error,

vs.

THE CHICAGO, BURLINGTON AND QUINCY RAILROAD COMPANY et al.

Error to the Supreme Court of Iowa.

No. 192. At Law.

MILLS COUNTY, IOWA, Plaintiff in Error,

vs.

CHICAGO, BURLINGTON AND QUINCY RAILROAD COMPANY.

Error to the Supreme Court of Iowa.

BRIEF FOR THE DEFENDANTS IN ERROR.

We condense here a statement of the pleadings, making the synopsis omit *no* material element of these, but attempting to so shorten them as to save labor in getting at their substance.

The Bill in Equity.

1874, January 29.—Mills county filed bill in equity *vs.* Burlington and Missouri R.R. Co., et als., in the district court the substance of which is as follows:

That said B. & M. is an Iowa corporation; that act of Congress of 15th May, 1856, (11 Stats., 9,) granted to Iowa alternate sections of land to aid in construction of railroad from Burlington to point on Missouri river near mouth of Platte; that Iowa legislature, on 14th July, 1856, (see plaintiff's brief, 11,) granted to said B. & M. so much of said lands and privileges as said act of Congress of 15th May, 1856, devotes to the said B. & M. line—such Iowa act attaching to its grant certain conditions, as for example, in section 6, that line be definitely located by 1st of April next, and plats filed with Governor; and section 8, requiring seventy-five miles to be completed in three years from 1st of December next, and thirty miles per year for five years thereafter, and residue of line in one year after the five years; and on default Iowa to have right to resume what is by the act granted—the company to assent, in writing, to this act—that the said B. &. M. Co., within ninety days, accept said grant, and, under said act of Congress and of Iowa legislature, said B. & M. Co. has received —— acres of land for completing said line; and the line was definitely located on 24th March, 1857, so as to secure the land grant, and thus the company became bound to make said road on said line; that, early, a conflict arose between the said county and said B. & M. as to which owned 23,365 acres of land set forth in exhibit "A," being swamp lands; that in a suit between said county and said B. & M., the county got judgment at June Term, 1867, for said lands, the said B. & M. claiming them under said act of Congress of 15th May, 1856, and of Iowa, of 14th July, 1856, and *said county claimed the same land, (schedule A) under the swamp-land act*

of Congress of September 28th, 1850, (9 Stats. 519,) and of 2d March, 1849, and the act of Iowa legislature of 13th January, 1853, and supplementary acts disposing of the swamp lands so granted 28th September, 1850, by Congress.

That the Supreme Court of Iowa affirmed said judgment on B. & M.'s appeal; and this was never reversed, but was, on 7th February, 1870, by the United States Supreme Court affirmed under a submission, on 2d of February, 1870, on its merits, and so all of B. & M.'s claim to said lands, in schedule "A," which were based on said acts of Congress, and of Iowa, and of officers, have, by courts, been held void; that just before beginning work in Mills county, on said line, and when said cause was on appeal pending in the United States Supreme Court, the said B. & M., by resort to "scare lines" and other frauds, threatened (notwithstanding said contract to construct on said *fixed* line) to abandon said line through Mills county and to adopt rival line, and thus so alarmed and influenced the county board of supervisors that it, in the fall of 1868, entertained a proposition affecting said schedule "A" lands; and by which such lands were devoted to securing the completion of said railroad *via* Glenwood, not to be binding unless road was completed by Glenwood and depot built, &c.,—*the Supreme Court suit to be continued* until road and depot so made; and on default of such completion such Supreme Court case to be tried. (A copy of such compromise made Exhibit X.)

Avers said compromise void, because it attempts to devote Mills county swamp lands to making a railroad through said county, which could not be so devoted without popular vote, which vote was not had until 19th June, 1871, and yet certain county supervisors made quit-claim deeds, at different times, for divers tracts of swamp lands—one dated 18th October, 1869, for 6,260.55 acres and made Exhibit "C;" another 18th October, 1869, for 1,960 acres, Exhibit "D;" another 4th January, 1870, for 1,760 acres, Exhibit

"E;" another 6th September, 1870, for 3,560 acres, Exhibit "F;" another 19th June, 1871, for 240 acres, Exhibit "G"—making in all 13,720.55 acres. That said compromise was void, was obtained by fraud, and *supervisors had no power to make it*, nor the grantors of said deeds power to make them, and that these contracts and deeds were without consideration, and hence void, and the B. & M. has no title. That neither party treated such compromise as a settlement of the Supreme Court suit; but such suit was stoutly contested, and was submitted to the United States Supreme Court on merits. That Mills county had no power to make said compromise, *as it involved a division of a trust*, and involved a surrender, by agents, of the whole subject-matter in controversy in a suit of their principal. That compromise was not, and was not treated as, a compromise of said suit, but a mere donation to secure what the company was already bound to do, *and an attempt to devote swamp lands to build a railroad, &c.* That after said deeds C, D, E, F, and G were delivered, the supervisors of Mills county, in 1871, ordered said compromise to be submitted to a vote on 10th October, 1871, and 1,031 votes were cast against and 357 for such compromise, and so Mills county repudiated the compromise; and hence these deeds, &c., should no longer be a cloud on title. That defendants—Forbes, Kidder and Griswood—claim some interest in said lands; then repeats, as separate defense, this vote of 1,031 against and 357 for compromise.

PRAYER.

1. That the county's title to lands in said Schedule A be decreed to be *res judicata*.

2. That said compromise be declared void for fraud, and to be illegal and not the contract of Mills county; that supervisors had no power to bind the county, and so of said

deeds "C," "D," "E," "F," "G" are without consideration, and that B. & M. acquired no interest, &c.

Then follows the exhibits A, B, C, D, E, F, G, and H. Record, from 1 to 16.

Amended Petitions.

1874, Aug. 27, (R. 17.)—An amendment filed claiming as proceeds of sales by B. & M. Co. of some of the swamp lands named in the petition, and which was *trust* property belonging to plaintiff as trustee, of which trust B. & M. Co. had notice, amounting to $5,000, and which sales, &c., were an unlawful diversion of a trust. This amendment claims that B. & M. sold these five thousand dollars worth of lands and asks, for the county, these proceeds.

1874, Dec. 30, (R. 18.)—Amended petitition by verifying it and inserting after N. A. Griswald's name in eighth subdivision of first paragraph the names of James W. Brooks and Alpheus Hardy.

1875, Aug. 26, (R. 18.)—Amended petition by inserting other defendants named as claiming some interest in the tracts named in the amendment and in Exhibit "X"; reaffirms original petition; "*expressly avers that she is the owner in fee of all the lands described in her original petition and in this amendment and prays that plaintiff's estate in lands be established*," &c.

1876, Feb. 7, (R. 19.)—Amended petition offers defendant back all taxes by them paid, and alleges all that can be realized from lands in controversy is needed for draining, &c.

Various Answers and Demurrers.

On pages 20 and 21 will be found a note of certain demurrers and answers by defendants.

1875, April 13, (R. 20.)—The defendant, the B. and M. Co., answer, disclaiming all interest in the lands in suit, and saying in substance that before 31st December, 1872, defendant had by contracts sold large part of the land to persons not parties, and had made deeds for others to persons not parties, and on 31st December, 1872, it had transferred and set over to Chicago, Burlington and Quincy R. R. Co. all the residue of its interest in the lands in suit; hence asks to be dismissed.

The Principal Answer.

1875, April 13, (R. 21.)—The C., B. and Q. R. R. Co. answer. This answer is full, lengthy, and explicit on all parts of the bill; denies every averment of bill not admitted in the answer or inconsistent with answer; avers it owns in fee all lands in suit not sold by B. and M. before 31st December, 1872, or what have not, by its consent, been since sold by B. and M.; these two classes being set forth in Exhibits "A" and "B," and in these lands disclaims any interest save such as may arise from breach of contracts of sale; sets up the pendency, on 13th July, 1868, in the United States Supreme Court, of the Mills County suit named in the petition, covering the lands in this suit; that said county had, before it began the suit so pending in the United States Supreme Court, sold about 9,000 acres of such land involved in last-named suit, which was undetermined on 13th July, 1868; that of its *own motion* and without defendant's knowledge and prior to 13th July, 1868, the supervisors of Mills county, being in doubt as to said land titles, appointed a committee, composed of

D. H. Solomon and others, and authorized them to submit a proposition to B. & M. of all matters in controversy, and pending in the United States Supreme Court, who, on the 13th day of July, 1868, did submit the offer, Exhibit "C;" that this, after due consideration, was by B. & M. on the 31st day of October, 1868, accepted, and the acceptance was reported to said board of supervisors at November term, 1868, and was ratified, and ratification made a record, and such record is Exhibit "D." That Mills county, and also B. & M. appointed committees to adjust what lands had been pre-empted, &c., and these committees settled as to these; and the B. & M. made deeds to county for these pre-emptees, Exhibit "E," and performed *all its other obligations*, and the county deeded to B. & M., as per compromise, the lands named in petition. That in years 1870, 1871, 1872, 1873, and 1874, these lands so deeded to company were assessed for taxes by county, and these taxes B. & M. paid and took county receipts for years 1870, 1871, 1872, and 1873, amounting to several thousand dollars, and county thus *estopped*. That long prior to said compromise the county taxed several thousand acres of these lands; that much of these lands the county sold for taxes, and allowed B. & M. *as owner* to redeem, and issued to B. & M. certificates of redemption, and is thus *estopped*, a list of which is Exhibit "F." That after the compromise the said Supreme Court case was not contested, or any attention given it except to continue it; and on the 7th February, 1870, court, *on own motion, and without the knowledge of either party or attorneys*, ordered Mills county case to abide decree in Fremont county case. That thousands of acres of this land were sold by B. & M. and deeds recorded *before* this action, and these people have been taxed, and taxes paid to Mills county, and thus county *estopped*. That on 31st of December, 1872, the C., B. & Q. Railroad, relying on said acts of Mills county, &c., and *before* this suit was instituted, purchased and paid for lands (so far as not

before that by the B. & M. sold) without any notice of matters set out in petition, a copy of which conveyance is Exhibit "G"; that said lands in dispute did, at date of compromise, belong to B. & M., and not to the county, and *were not swamp land, within act of 28th of September*, 1850, *were all odd-numbered sections and within grant of 15th May*, 1856, *and were duly selected by B. & M. under the Iowa act of 14th of July*, 1856, *to wit, section* 6, which is set out (R. 25); that B. & M. made no contract with county to build through Glenwood; and Iowa specially exempted the B. & M. from building on a fixed line, and sets forth the term, in section 6 of act of 14th of July, 1856, (R. 25,) making location final only as to land limits; that the lands in suit never were patented to Iowa, but, on contrary, Commissioner of General Land Office had *rejected county's claim therefor, and such Commissioner, with approval of Secretary, had certified these lands to B. & M. as lands due B. & M. under act of 15th of May*, 1856, and these had been selected with reference to line of B. & M.'s road definitely fixed and located 25th July, 1856, which were by Secretary withdrawn from sale October, 1856, and certified to company; that both B. & M., and also county, sold various tracts of these lands to *bona-fide* purchasers, and this made both anxious and uneasy, and to settle all this the compromise, in good faith, was made and carried out; and when this done no further attention given by defendant to suit in this court; denies county induced to compromise by fraud and by "scare lines."

Prays for decree quieting title, &c.

REPLY.

1876, January 1, (R. 38.)—Plaintiff filed a long reply, but in this there is nothing requiring to be here noticed, except to say that in paragraph 15 (R., 40) is a repetition of what is in bill, and amended bill (R., 5, 18) about the

lack of power to compromise and grant lands because they were trust lands, and the deeds "were in violation of law," (R., 40.) And in said reply (R., 39) it is avered that the "lands were trust property, and so owned and held by the plaintiff under said act of Congress and of the General Assemby," * * * "of January 13, 1853," and of other Iowa acts, * * "and of certain other act of Congress, approved 3d March, 1857."

Nowbere in the pleadings, even in the reply, is it set up or claimed that any act of Congress was anything more than the source of title to these lands so affected with the alleged trust. Whether the trust was created solely by exercise of the "large discretion" of the state, (10 Otto, 69,) as contained in the Iowa act, and which "large discretion" was conferred by the act of Congress, is not stated. Every averment of the pleadings, as to this point, is perfectly satisfied by saying that they assumed that Congress gave to Iowa an absolute unqualified title in fee, with which the state had power to do as it pleased; but accompanied this absolute dominion with a charge, addressed to the good faith of the State, directing that proceeds be applied to drainage, and that under this request of the donor *the laws of Iowa* alone imposed and created the trust.

BRIEF.

This Court has no Jurisdiction in this Case.

The main object of the foregoing synopsis has been to get fully and compactly before the court the whole of the issues made in the pleadings. The result of this synopsis is to show that there is not in this case even a semblance of a "Federal question," unless such question is found in the claim that Mills county had no *power* to make the compromise and the deeds thereunder, because it involved a "diversion of a trust" fund, the claim in that view being that such trust arose out of the terms of section 2 of the Swamp Land Act of 28th of September, 1850, (9 Stats., 519.) This section provides that "*the proceeds of said lands, whether by sale or direct appropriation in kind, shall be applied exclusively, as far as necessary, to the purpose of reclaiming said lands by means of the levees and drains aforesaid.*"

It will be observed that nowhere in the bill or its amendments is even this much of claim made under this or any other Federal law, unless it is so made by the words of the petition near bottom of page 5 of the record, the same being repeated in an amendment, (R. 18,) where these petitions simply aver a want of power to make the compromise, as it involved a "diversion of a trust fund." The reply at page 39 repeats this. And nowhere, outside of the pleadings, does it appear that any claim was set up under any law of Congress which was denied, unless the said clause about "diversion of a trust" be such "setting up." Does this claim by Mills county of the right to repudiate the compromise, owing to an alleged want of power in it, as a trustee acting under Iowa statute of the 13th of January, 1853, (brief of plaintiff, 7, &c.,) granting the swamp lands of the county, respectively, in which they lie "for

the purpose of constructing the necessary levees and drains to reclaim the same," set up a claim under a law of Congress which gives this court jurisdiction?

Plaintiff's Statement of the Federal Question.

At the bottom of page xii of the opposing brief is found the plaintiff's answer in the affirmative to this question, and an indication that this, and this only, is the plaintiff's reliance in asserting this court's jurisdiction.

It is said there that all the lands in suit were swamp lands, and that the contracts and deeds, which this suit seeks to set aside, relate to such lands, and the bill seeks to restore their proceeds to the trust created under Federal law, which law is violated by this diversion; and that it appears that this question must have been raised, presented, and decided against the right, so asserted by plaintiff, under the said statutes of the United States; and that such decision was wrongful.

Federal Question not Properly Set Up.

Please note what was the "title, right, privilege, or immunity claimed under a * * * statute of the United States" by the plaintiff, and which right was resisted by defendant and was decided against by the court.

It was not the claim that the lands in suit did not pass under the swamp-land act to Iowa, or that these did not pass to Mills county in virtue of said swamp-land act, and of said Iowa act of 13th January, 1853, or that Mills county did not take a fee under said act in the lands in suit as the petitioner avers she did (marginal page 28, R. 19.) As to this ownership in Mills county, prior to compromise, and as to such swamp-land act and the law of Iowa of 13th January, having created such a title in Mills county, there

was no manner of contention in this case in the court below.

The entire question in the argument, on this point, was this: Was the title which the county held so fettered or conditioned by the swamp-land act, as that the compromise was void. Stating plaintiff's claim as to this as strongly as possible in its favor, it becomes something like this: That, although the swamp-land act and the Iowa act, of January 13, together, gave Mills county a fee-simple in these lands, so that she could sell them, and although that fee-simple title was such, and the compromise deeds to B. & M. such, that the latter could thereunder make good titles to the vendees who paid in the five thousand dollars demanded by the amended petition filed 27th of August, 1874, (R. 17,) yet said swamp-land act so impressed a trust on this Mills county title, and on the proceeds of these sales, as that Mills county can set up the swamp-land statute and the trust thereunder, in order to defeat the fee-simple title which the compromise secured to the B. & M. In other words, for the purposes alone of this point, *both* parties concede to Mills county a fee-simple title derived under the swamp-land act; but one of them asserts, that that act, in some way, so follows this land and money into the hands of purchasers from Mills county as that Mills county can base *on the swamp-land act* a "claim" that Mills county is entitled to repudiate the sale as one made in violation of the "trust" declared in favor of drainage in the swamp-land act. Conceding now, for the purposes of the argument, that the thing just stated, if properly set up and affirmatively claimed, is a Federal question, yet we doubt whether the record shows that even this much of a Federal question was so affirmatively and definitely set up as to give this court jurisdiction.

It cannot be claimed, and we suppose is not, that here any Federal question appears, unless under that clause of 709 which reads: "or where any title, right, privilege, or im-

munity is *claimed* under any " * * * " statute of the United States," * * * " and the decision is against the title, right, privilege, or immunity *specially* set up or claimed " * * * " by either party " * * * " under the statute."

Is that question or " claim " stated at bottom of page 12 of plaintiff's brief, and above quoted," " *specially set up or claimed* " within the meaning of this clause of section 709 in any part of the record ?

Please observe, as already noted, that nowhere in the petitions or in the decree of the court is the claim " specially " or generally set up or made in any way that it was the *swamp-land act or any other law of Congress as distinguished from the Iowa acts*, which created the alleged " trust," or which prohibited such a compromise, or which rendered void said deed by the county to the company. It is not claimed, nor is it true, that the Iowa laws regulating the " disposal " of these swamp lands could not or did not add, in its grant of these lands to the county, terms and conditions not found in the acts of Congress regarding these lands. On the contrary, sections 2 and 4 of said act of Congress of 1850, (9 Statutes, 519,) expressly makes these lands " subject to the disposal of the legislatures " of the states. And it is completely settled that section one of such act is itself, and of its own vigor, a grant *in presenti* of the fee simple in the lands to the states. So it is held in the case gentlemen here especially rely on, (Railroad Company *v.* Smyth, 9 Wall., 95,) where the decision is thus stated by Justice Miller, speaking of this swamp-land grant of 1850 :

" Here is a present grant by Congress of certain lands to the states within which they lie; but it is by a description which requires something more than a mere reference to their townships, ranges, and sections to identify them as coming within it. And the court decides that to show that any particular tract came within this *present* grant parties might show that the tract was of the class (to wit, more than half wet) covered by the grant."

So in French *v.* Fyan *et al.*, 3 Otto, 170, this court repeats this in these words:

"This court has decided more than once that the swamp-land act was a grant *in presenti, by which the title to those lands passed at once to the state in which they lay, except as to states admitted to the Union after the passage of the act.*"

Here this existence of the title *in fee* in the state for whatever was in fact swamp lands, is alluded to for the single purpose of saying that both by the express term in the swamp-land grant which put the lands at the "disposal of the legislatures," and also by virtue of the fact that the state took a title *in presenti*, in fee, was the state, *as a matter of law*, invested with *power* to attach to this "disposal" of such lands every such *additional* or *different* condition as she might elect. This Iowa did in fact do. We are not *now* saying anything on the point as to whether, over the state, the swamp-land grant reserved such power as would enable the United States to forfeit the grant or get back the land in case the state attempted to devote these to *other* purposes than drainage. As remarked by the Supreme Court, (9 Wall., 99,) "no act of Congress has ever attempted to take back this grant." But whether this is possible or not is, for the *present point*, wholly immaterial; such present point being that after 1850 it was perfectly competent for Iowa to do what she did do—prescribe the terms, conditions, methods, payments, &c., which should enter into the disposal of these lands. Our present point is that the state had "*at last large discretion*" (10 Otto, 69) given her as to these lands.

And this petition abundantly sets forth, pleads, and strenuously claims under, and relies upon, the terms, conditions and provisions of the laws of Iowa regulating the sale of this land and the proceeds thereof.

On the other hand, the pleadings nowhere affirmatively "set up," either "specially" or generally, the swamp-land

act, *as distinguished from these laws of Iowa*, as *the* act which prohibited this compromise or the deeds thereunder, or as the one which rendered these void, or even as the act which created, or defined and measured, the "trust" alleged to have been violated.

Such being, incontestably, the state of this record, this makes here applicable on this point of jurisdiction the cases like the following:

In Dugger *v.* Bocock, 14 Otto, 603—

"The rule in relation to our jurisdiction is that it must either appear from the record in express terms that there has been a decision against the right claimed under the Constitution, laws, or treaties of the United States, or that the judgment or decree complained of could not have been given without so deciding. (Murry *v.* Charleston, 96 U. S., 432.) *There are no averments in the bill which directly present the validity, under the laws of the United States, of a payment in Confederate securities, and it may fairly be inferred that the appellants relied upon an entirely different ground for the relief they asked. Such being the case, no Federal question was necessarily involved in the decision that has been made. As the burden is on the appellants to show our jurisdiction, and we cannot entertain the case unless they have done so, the writ of error is dismissed.*" (See 14 Otto, 427.)

Precisely so in this case. "There are no averments in the bill" (or anywhere else) "which distinctly present the validity, under the" swamp-land act, or other act of Congress, as distinguished from Iowa law, of this compromise; and it may be fairly inferred that the plaintiff relied upon an entirely different ground for the relief asked, to wit, on the provisions in the laws of Iowa; therefore "no Federal question was necessarily decided in the decision that has been made.".

See same principle, 15 Wall., 68; 1 Black, 518.

Observe that our point is now *not* as to whether the claim stated at bottom of page 12 of plaintiff's brief, *if properly made in the record*, would or would not be a Federal

question. We come to that hereafter. We are *now* only saying that if such question be conceded to be a Federal one, yet the question is not so "set up" "specially," as is required in section 709, as to enable this court to take jurisdiction.

So in Bank *v.* Board of Liquidation, 8 Otto, 142, this court says:

"We have often decided that it is not enough to give this court jurisdiction, on the judgment of the state courts, for a record to show that the Federal question *was argued* or presented to the court for decision. It must appear that its decision was necessary to the determination of the case, and that it actually was decided, or that the judgment as rendered could not have been given without deciding it."

It may be that the *argument* below sought to show that the swamp-land act, *as distinguished from the laws of Iowa*, rendered this compromise void. We know not as to this, but we know that this is wholly immaterial, because the record made place for no such argument; and the opinion of the court (if that may be looked to—see 14 Otto, 427–8) not only fails to show that the court passed on this point, but it shows, on the contrary, that the court did not do so. To here employ the language of this court in Maxwell's case, (18 H., 516,) "The questions raised and decided in the the state court point altogether for their solution to the laws of the *state*, and make no reference" (on this point) "to the Constitution and laws of the United States."

In the foregoing, in regard to how the Federal question must be "set up," we are not, of course, claiming that it must be set up *in express words*. The test as to whether a Federal question was raised is this: Is the record such as to *affirmatively* show (14 Otto 427,) that the "determination or judgment could not have been given without deciding upon a right or authority claimed to exist under the Constitution, treaties, or laws of the United States, and deciding against that right." (Language in Murry *v.* Charleston, 6 Otto, 442.)

But whilst this is true, it is equally true that the existence of a Federal question is *never presumed* and must be "*affirmatively*" shown, as explained in the above cited cases. (14 Otto, 427, 428; 14 Otto, 603.)

In Day's case the jurisdiction was defeated where the state judgment was against a marshal's levy of a writ shown as issuing from a Federal court, because the record did not *affirmatively* show more fully that he acted as marshal. (See bottom of page 105, 2 Wall.)

In Smith *v.* Adsit, 16 Wall., 185, the bill in equity sought to recover lands alleged to have been obtained by acontract made void by one of the public land laws of the United States. But the bill there expressly relied on the act of Congress as avoiding the contract, which stood in the way of the complainant's recovery of the land. But the record did *not* affirmatively show what the ground was on which the Supreme Court of Illinois dismissed the bill for want of jurisdiction.

There this court held that in so failing to show *affirmatively* that a Federal question was decided, the jurisdiction of this court was defeated. A clear and compact statement of the law, and the cases regarding how the federal question and its decision must be disclosed, is there (16 Wall., 185) found in Justice Strong's opinion.

In Insurance Co. *v.* Hendren, 2 Otto, 287, the Chief Justice states this rule tersely in these words: "It" (the Federal question) "must appear in the record, or we cannot proceed. We act upon questions *actually* presented below, not on such as *might have been* presented or brought into the case but were not."

We should not have felt willing to present these exceedingly worn and familiar cases in regard to how the "setting up" and the decision of the Federal question must be by the record disclosed, were it not for our distrust of our own convictions even on this familiar law, when we find them in conflict with counsel so learned as those on the

other side. To us it seems too plain for argument that this record does *not* show that the alleged Federal question stated on page 12 of the opposing brief was either "set up" or decided.

If we are right in this, then of course that ends the case.

What is Here Relied On is a Principle of General Law and is Not a Federal Question.

But as counsel cannot *know* how the court will view this point, we must go on to other questions.

The next question is whether what is stated at bottom of said page 12, when viewed in the light of the record, constitutes a Federal question. In other words, where *both* parties (for the purposes of this point) allege that Mills county got under swamp-land act and Iowa acts such a fee-simple title (R., 19) in these lands as that she owned them and could convey them by this compromise so effectually as that the B. & M. could "sell" and make good titles to those who paid therefor the $5,000 asked for in the plaintiff's amended bill, (R., 17,) and when, therefore, the reliance on this act of Congress for the avoidance of this compromise is expressly and affirmatively shown NOT to be because this swamp-land act prevented the legal title from passing under the compromise deeds, is there any *other* infirmity left in the title under the compromise, as such infirmity is disclosed by the bill, which can be recognized as a claim "specially set up" under an *act of Congress*, as distinguished from one under the general law of trusts or of equity or under the laws of Iowa?

For the purposes of this point the court will, of course, assume that what plaintiff insists on is true—that these lands were swamp lands. Being swamp lands, then not only does the face of the petitions show, but the cases above cited, such as Railroad *v.* Smith, 9 Wall., 95, and French *v.* Tyan *et al.*, 3 Otto, 170, show that there was in law and

fact nothing that prevented Mills county from granting a legal title. Whatever the bill may show contradictory of those aspects of the bill as amended, which show the plaintiff as claiming an unqualified fee-simple and as having by the compromise made to railroad a *legal title*, such as enabled the B. & M. to sell these lands, (R., 17,) yet these aspects of the bill render it impossible in law that this bill should be held *also* to "set up" a "right" under an act of Congress, which "right" must, as a matter of law, have for its basis the fact that Mills county *could not and did not* grant by this compromise a valid legal title to the B. & M.

We now further submit, that, since the pleadings admit that the *acts of Congress* do not prohibit the grant of *title* made by this compromise, and since no "claim" is *effectively* "set up" based on the *act of Congress*, as distinguished from equity principles and the laws of Iowa, which "claim" asserts that no legal title could or did pass by the compromise, owing to the force of acts of Congress, therefore, this alleged "right" to repudiate the compromise has for its basis no Federal question, but only general doctrines of trust and of equity, together with the laws of the State of Iowa.

To use the words of the chief justice, in a somewhat analogous case, (Brown vs. Atwell, 2 Otto, 329,) we say that when the parties admit that the act of Congress secures to plaintiff no right to say that the compromise did not pass the *legal title*, then, to say that the compromise was a "diversion" of a trust is but "*the presentation of a principle of general law*," and not of a claim based on an act of Congress.

An examination of the opinion will show how much nearer the plaintiff, Brown, came, in that case, to setting up, under section 11 of patent laws, an "exemption" from Scott's demand of an accounting, than it can be fairly claimed in this case the plaintiff has come to setting up a claim under swamp-land laws. And yet this court held

in Brown's case that Brown's claim was really based on "*principles of general law.*"

In United States *v.* Thompson, 3 Otto, 586, the United States set up the claim that, by section 3466, Revised Statutes, the United States held a preference in right of the payment of there demanded, but admitted that the debt had been paid by a certain check and the right of preference was gone, *unless* the non-payment of the check left the debt unpaid; which last was the contention of the United States. But the court said, that the question of the effect of the non-payment of the check was but a question arising under the *general principles of the law* and declined to take jurisdiction.

So in the present case, what "right" in the way of enabling Mills county to get rid of this compromise arises out of the "trust" obligations attaching to a valid title passed, is a question which does not depend on the act of 28th September, 1850, but upon the principles of general and of Iowa law. It not being "set up" that the acts of Congress render the compromise deeds inoperative, then any trust obligations as to use of proceeds is a matter of general law and not a creation of the act of Congress.

In Bank *v.* McVeigh, 8 Otto, 332, the same thing is again repeated.

Myrick *v.* Thompson, 9 Otto, 297, is a case where contracts about public land were, as here, sought to be turned into Federal questions. There were some six of these, and the court declared that it was "not necessary to show that none of these several defenses present any Federal question for re-examination."

In People *v.* Central R. R., 12 Wall, 455, an act of Congress (28th June, 1834) gave assent to a contract between New York and New Jersey, fixing a certain boundary between these states; and New York sued a railroad company which caused a certain alleged nusiance on land which New Jersey claimed this contract gave her, and for making which structures New Jersey gave the railroad

company license, but which New York claimed the said contract put within New York. It was asserted, in this case, that the said act of Congress, assenting to said boundary as agreed, was one which *approved and created such a boundary as said contract, properly construed*, did fix and hence that thus a right was set up based on a true construction of said act of 1834. But this court held that the right there asserted was a mere *contract* right, and not one drawing in question the construction of an act of Congress.

Romie *et al v.* Casanova, 1 Otto, 379, was an ejectment wherein plaintiff claimed the land as arising out of a grant by the pueblo of San José, and that this pueblo title was granted and confirmed by treaty and acts of Congress. The defendant asserted same thing as to the title of San José. Both parties admitted, and asserted, that the treaty and acts of Congress had put a good title in the pueblo, which the pueblo could convey to either party. And each, as against the other, set up a grant from San José of a title so arising out of treaty and acts of Congress. In deciding the case the court says:

"The title of the city was not drawn in question. Even if it" (the title) "*depended upon the treaty of Guadaloupe Hidalgo and the several acts of Congress to ascertain and settle private land claims in California, the case would not be different.* Both parties admit that title and their litigation extends to the determination of the rights which they have severally acquired under it."

And the court refused the jurisdiction.

So precisely here, only for the purpose of the point, both parties say the compromise is one Mills county could make. Both parties admit these were swamp lands and that Mills county held a good title under acts of Congress and of Iowa, which she could convey. The question whether she did, by the compromise, make a valid conveyance depends on *general law* and not on any acts of Congress.

McStay *v.* Friedman, 2 Otto, 723, is another case nearly identical in its facts with the last named case, which was decided the same way.

The same familiar legal principle is asserted in Hartell *v.* Tilghman, 9 Otto, 547, and cases there cited. Wilson *v.* Sanford, 10 How., 99.

Violation of an Act of Congress no Ground of Claim Under Section 709.

The court will, of course, have observed that if this record shows that any "right" was "set up," based on an act of Congress, it is the right to have the court deliver Mills county from its act *violative* of the "trust" alleged to have been created by the swamp-land act. See opposing brief, page 12. It is, in substance, a claim that the policy of the swamp-land act forbade the plaintiff from so "diverting" the proceeds of these trust lands, although the act gave power to sell generally, through its bestowal of the absolute fee; and the "right" alleged to be "set up," under the act, is the "right" to use the act for the purpose of setting aside a compromise made by plaintiff in alleged *violation* of the policy of the act. In other words, a party who has violated the policy of an act of Congress asserts that one of the "rights," which section 709 of the Revised Statutes, confers is the "right" to use the statute, which he says he has violated, to deliver him in this court from the contract which he alleges as made in violation of the policy of said act. Now this is precisely what this court has held a party who has made a contract, which contravenes the laws of the United States cannot do, in such cases as—

Walworth *v.* Kneeland, 15 How., 351.

That was a bill in equity to compel Walworth to convey a certain tract of land for which Walworth had obtained, from the United States, a patent, and which land

the bill alleged Walworth had, when the tract was public land, bound himself, through certain contracts, to convey to complainant. Walworth, in his answer, "set up" what, in substance, is here set up by Mills county, to wit, that the contract relied on in the bill was made in contravention of the laws of Congress, and to defeat public land sales thereunder; and he relied on these acts of Congress to deliver him from his contract, and he claimed that the "setting up" of that "claim" of deliverance was a setting up of a claim under section 25 of act of 1789.

In this case Mills county says that she has "set up" the claim that her compromise violated the swamp-land act; and hence that her contract was void; and hence she "set up" a Federal question; and hence this court has jurisdiction to use the violated act to create a "right" to avoid the contract which constituted the violation.

The syllabus of the court's decision is an accurate statement of what the court held on the point—Is this a Federal question? It is in these words:

"Under the 25th section of the judiciary act of 1789, (1 Stats., 85,) a party cannot come into this court, because a state court has refused to allow his defense that the contract sued on was made by him and the plaintiff in fraud of an act of Congress. *This is not a right or title under an act of Congress within the meaning of the 25th section.*"

We cannot see why this decision is not conclusive of the present case. It simply decides that the "claim" in a state court, that a contract was void because it violated an act of Congress, is not one of the "claims," made under an act of Congress, which is covered by section 25—now section 709. That is precisely what Mills county says in her "claim."

Notice that this decision is not escaped from by saying Mills county may, because, as a *public* corporation, she sues for the people, who are not *in pari delicto*, set up, in the courts her illegal act in order to avoid the contract, whilst

a private citizen may not. The answer is, that so may a private citizen do this in order to escape from a decree for executing specifically a contract made in violation of a statute. And this court so expressly held in the Walworth case. (See page 353.) This court there adds: "Had the state court committed so gross an error as to say that a contract forbidden by an act of Congress, or against its policy, was not fraudulent and void, and that it might *be enforced* in a court of justice, it would not follow that this writ of error could be maintained." * * * "*The act of Congress certainly gives him no right to protection from the consequences of a contract made in violation of law.*"

Precisely so here. Even if it be conceded that Mills county made this compromise in violation of the policy of the swamp-land act, and that she has a right, in the courts of Iowa, to be released from that contract, owing to its being a violation of the policy of the swamp-land acts, and if the Supreme Court of Iowa erred in refusing this deliverance, yet *it was not the violated act of Congress which gave that right*, but it was those *general principles of law* (if there be such) which say that a county may, in the interests of the public, set up her own wrong in order to escape from an illegal contract.

In Udell *v.* Davidson, 7 Howard 7 69, is an almost exactly similar case, where a defendant to a bill in equity, brought to compel him to perform a contract as to the entry, sale and disposition of the proceeds of public land, claimed in the state court a right, under the pre-emption act of 1838, (5 Stats. 251,) to repudiate his contract (just as Mills county does) because made in contravention of the said act of 1838; but the Supreme Court of the state decreed that the defendant Udell should execute the agreed trust.

He brought the case, on error, to this court, alleging that he had been deprived, in the state court, of a right secured to him by said pre-emption act, to wit, the right to repudiate his contract and keep the land.

This court held, with some emphasis, that this right to repudiate was *not* one of the rights given by section 25 of the act of 1789.

In view of these and like cases, we feel confident that the alleged "Federal question," even if raised by the record, is not such; and hence, also, this case must be dismissed.

IF FEDERAL QUESTION SET UP IT WAS RIGHTLY DECIDED.

But suppose the alleged Federal question is, indeed, such, and is properly presented in the record, then, we ask, did not the state court rightly decide it?

We submit that, if decided at all, it was rightly decided.

The substance of this alleged "right" of Mills county, supposed to be "set up," is, (if we are to disregard the averments in the bill that Mills county had a fee,) that the swamp-land law protected and preserved these lands to Mills county as against this compromise sale; and as the act rendered the county powerless to make such a sale, therefore, in the courts, Mills county may appeal to, and she did appeal to, this act for the preservation to the county of these lands.

Now, if, as a matter of law, the swamp-land act did *not* so preserve to Mills county these lands as against such a sale as this, then of course that puts an end to this case in this court; because then its decision, by the Supreme Court of Iowa, this court must pronounce right, and if right this court can decide no *other* question raised by the record in the court below. So this court steadily holds as in Myrick *v.* Thompson, 9 Otto, 297; Murdock *v.* City of Memphis, 20 Wall., 590.

We are therefore again turned back to a question to which we have already repeatedly alluded, and in part considered, namely: Does the swamp-land act fetter or limit Iowa's

power of sale, and, through Iowa, fetter Mills county's power of sale in such degree as that Mills county—owing to this *act of Congress*, as distinguished from other restraints on the power of sale—could not make such a grant as she did to this B. & M. Company?

Now, in coming to this question of *ultra vires*, it must all the while be kept in mind that the alleged restraints on the the county's power to make these deeds, and this compromise, also the alleged invalidity of the compromise, which spring out of either the supervisors' lack of authority under the state law to make them, either owing to a want of a popular vote or to the fact that an agent or trustee cannot surrender and end the entire subject matter of the trust, (R., 5,) or because there was no consideration to support the compromise, or because the deeds were procured by fraud, cannot enter *at all* into the decision of the present point, to wit, *did the swamp-land act* protect these lands from such a conveyance?

This is so, for the obvious reason that these questions as to a popular vote, a lack of consideration, a trustee or agent being unable to surrender his trust, the county board being unable, under the state law, to dispose of county property—are, in the first place, matters of *state* law, and not within this court's jurisdiction under section 709; and, in the second place, those of them turning on the laws of Iowa are *settled* by the decision of the Supreme Court of that State in this very case; and had they arisen in a case brought here from a decree of the United States Circuit Court this court must follow the decision of the Supreme Court of Iowa as to these local laws.

This is so plain a matter that the statement of it is enough.

And this fact renders not only unnecessary, but improper, any reply here to nearly the entire body of the opposing and very able brief.

That brief discusses almost exclusively questions of local

Iowa law, or questions of general law; not one of which this court can, in any event, consider. If you find here no Federal question then you dismiss the case for want of jurisdiction. If you find a Federal question *rightly decided* you affirm the judgment without looking further. If you find a Federal question wrongly decided you reverse the judgment without deciding other than the Federal question and *its* bearing on the kind of a decree required in the case, and send the case back for new trial in the state court. You examine the evidence and record here only so far as requisite to "*determine the validity of the right so set up under the act of Congress.*" Words of the court in

Rem. Bridge Co. *v.* Kansas Pacific R'y, 2 Otto, 317.

Hence the absence, in this brief, of reply to the able arguments of the other side, as to most of the questions of Iowa and of general law, must be attributed to the fact that, in no event, can this court consider these.

Thus, on the point, Was the Federal question (if there be one) decided right? we are brought to the separate and sole question, Does any law of Congress disable the county from making this compromise?

It may be that in this court we ought not, especially in view of the Adams county case, (10 Otto,) further consider this matter; but since it is all there is of plaintiff's case we deem it proper to add somewhat to what has already been said about this alleged *ultra vires.*

1. We have already seen that the plaintiff's case is, in the petition as amended, (R. 17 and 19), projected on the "claim," expressly made, that Mills county could and did pass, *by this* compromise, the legal title to these lands to the railroad, and such a title as enabled the railroad to sell them. It is evident, therefore, that the bill treats these deeds as not void, and the county, therefore, as having power to compromise and make these grants. For if

there was such a total want of power as to render the compromise void, then Mills county *could* not ratify a void deed into a grant.

2. The construction of the act of 28th September, 1850, given by the legislature of Iowa, in all her legislation disposing of these swamp-lands, is one which makes the power of the state over them absolute, (10 Otto, 70,) and makes Congress to have relied on the good faith of the states and not on a limitation on, or a fettering of, the title, for the execution of the trust. So that state's legislation has dealt with this matter from the beginning, a signal example of which is in that very section 986 (opposite brief, p. 71) of Iowa act of 22d March, 1858, containing the provision as to a popular vote. It will be seen that that section expressly enacts that "it shall be competent and lawful for the counties owning swamp and overflowed lands to devote the same and the proceeds thereof *either in whole or in part*" to school buildings, bridges, building institutions of learning, or making railroads in the county, but as to certain of these, requires a vote of the people; and then proceeds to authorize county officers to so "dispose" of such lands and to prescribe the methods of making contracts.

And this legislation even the opposing brief does not, I believe, claim went beyond the authority conferred by the Congressional grant, and only claims that the *state law's* requirements were not lived up to in making the compromise. But this is no federal question.

3. The uniform and universal interpretation of this grant by Congress, in the states deriving land under it, is thus stated by an eminent compiler of the judgments of the Supreme Courts of the various states having such grants. He says:

"The act of Congress of September 28, 1850, granting swamp land to the several states, vested an immediate title

to all the lands within the states of the kinds described, and the transfer of title did not await the official selection of the lands, but the selection when made related back to the grant."

To this proposition he cites—

Fletcher *v.* Pool, 20 Ark., 100.
Hempstead *v.* Underhill, 20 Ark., 337.
Branch *v.* Mitchell, 24 Ark., 431.
Owens *v.* Jackson, 9 Cal., 322.
Summers *v.* Dickinson, 9 Cal., 554.
Kernan *v.* Griffith, 27 Cal., 87.
Whiteside *v.* State's Attorney, 31 Ills., 68.
Dart *v.* Hercules, 34 Ills., 395.
Allison *v.* Halfacre, 11 Iowa, 450.
Barrett *v.* Brooks, 21 Iowa, 144.
Fore *v.* Williams, 35 Miss., 533.
Jackson *v.* Dilworth, 39 Miss., 772.
Tunson *v.* Metcalf, 40 Miss., 504.

We have examined these cases, and the foregoing is an *accurate* statement of their substance upon this point. For example, take the case of Summers *v.* Dickenson, 9 Cal., 554. The following, from the syllabus, is the exact substance of the decision of Chief Justice Terry:

"Immediately upon the passage of the act of Congress of September 28, 1850, this state became the owner, *with* ABSOLUTE *power of disposition*, of all the swamp lands within her limits which had not been disposed of.

The title of the state *in no way* depended upon a patent. The act itself operated as a conveyance."

The same thing is in Owens *v.* Jackson, same volume, 322.

The same thing is repeated in Kerran *v.* Griffith, 27 Cal., 87, 89, where the court, after citing the above California cases, uses the following language:

"These decisions are not only in harmony with the language of the act, when prperly construed, but are fully

sustained by the case of Foley *v.* Harrison, 15 How., 447, and the case of Wilcox *v.* Jackson, 13 Pet., 516. As late as November, 1858, the Secretary of the Interior held that 'it was not necessary that a patent should issue in order to vest the title under the act of September 28, 1858;' and in repeated instances circulars have been issued from the Department of the Interior, in which the same view of the effect of the grant has been taken."

An examination of the cases in 15 Howard and 13 Pet. will show that this court held that when the act of Congress uses words of grant *in the present tense* (as they do in the swamp-land act,) a fee-simple title passes.

In Courtz *v.* Burchell, 31 Ill., 68, the decision is stated in these words:

"By the grant" (28th Sept., 1850) "a fee-simple estate passed *unconditionally*. The state became the *absolute* owner of the lands, *with power to dispose of them in such manner and for such purposes as to the legislature might seem most expedient.*"

The court there held that under this act of Congress, Illinois could and did "remit to the counties the *exclusive* control over these lands and over their proceeds;" and hence that a purchaser from the county could not, under the swamp-land act of Congress, or under those of Illinois, disposing of such lands, *assert any trust as to the proceeds whereby such proceeds should be applied to reclaiming the lands.*"

In the body of the opinion, and in resistance of the view that the act of Congress follows these proceeds *with a trust*, the court uses the following words (pp 78, 79):

"Congress, in view of these facts, said to the states, 'these lands are of no use to the nation; take them; *we make you a perfect title to them;* drain them and reclaim them if you can; *we commit them and the whole subject to your legislation;* adopt the policy we recommend, but take the lands.' But if the grant was made upon trust that the proceeds of the lands should be expended in reclaiming them, where does the power reside to compel the legislature to execute the

trust specified? IF *it is a trust, it is of municipal* AND NOT JUDICIAL CONCERN, OVER WHICH THE POWER OF THE STATE IS PLENARY AND EXCLUSIVE. The principle, we think, is the same as that established by the Supreme Court of the United States in the case of Cooper *v.* Roberts, (18 How. 173,) in relation to the sale of the school sections. In that case the court said, '*the grant of those lands was to the state directly*, WITHOUT LIMITATION OF ITS POWER, though there is a sacred obligation imposed on its public faith. We think it was competent for Michigan to sell the school reservations without the consent of Congress.' In this case the sale was for school purposes, but the proceeds went into the general fund. We see no difference in the principle of that case and this. Here the grant is to the state directly of those lands, without any limitation of its power, and no application to Congress, or any other authority, is necessary to direct the appropriation of their proceeds.

On the acceptance of the grant by the state the subject of damage and reclaiming the lands and the proper disposal of them became a question of *state policy wholly*, to be determined by the legislature."

In Dart and Lothery *v.* Hercules, the same thing is strongly repeated.

If on this question what is the effect of the Congressional grant of 1850, the decisions of Iowa are, in this court, entitled to any *special* weight, owing to the fact that this case comes from Iowa, then we turn to the decisions of that state.

In Allison *v.* Halfacre, 11 Iowa, 451, regarding this grant, the court says:

"The objection proceeds upon the idea that the title to these lands is not vested in the state by the act of Congress granting them, but by the subsequent selection a patenting of the same is rendered necessary. This is simply a mistake. The act granting the swamp land operates, *ex proprio vigore*, to pass the title *at once*. The subsequent selection and patenting is required for the purpose of fixing their location and description."

In Barrett *v.* Brooks, 21 Iowa, 144, Dillon, J., uses these words:

"It is plain, for it is so *expressly* declared, that the fee of the swamp lands passed to the state, and the legislature of the state may dispose of the same."

Citing 11 Iowa, 440; 31 Ill., 68; 23 Mo., 449.

Then, on the point as to whether the state had power to dispose of the proceeds without limitation, and as to whether the plaintiff could compel their application to drainage, the court replies (p. 148):

"Beyond that it is certain that the state may dispose or authorize the disposition of the proceeds of these lands *without limitation.* This is one answer to the plaintiff's claim.

Another answer is this: The United States is the donor. Admit that the State or the county holds the land charged with a *trust* to apply the proceeds so far as to the reclamation of said lands. Who can enforce the trust? *The United States might.*"

He then proceeds to show that an *individual* cannot, even granting that such trust exists.

The case of Grimes *v.* Hamilton county, 37 Iowa, 290, is one elaborately considering the powers of the county over these swamp lands, and, whilst no question is made in that case about the act of Congress preventing the county from granting these lands in *compromise* of a disputed claim made by William Baker for services rendered the county touching swamp lands, yet the court *assumes* not only that the act of Congress, but also that no law of the state, prevents a grant of the lands in *compromise* of the claim; and the court expressly holds that there was nowhere any limitation upon the power of the county to devote the swamp lands to any use they might please.

In Allen *v.* Cerro Gordo Co., (34 Iowa, 54,) the same thing is decided, the decision being expressed in these words:

"When swamp lands were granted by the general government to the state and by the state to the counties in which the same were situate, it is held that a county thus interested might, through its board of supervisors, in view of the fact that its interests and claims in respect of such lands were *involved in doubt, enter into a valid contract with an individual to the effect that, in case he succeeded, through his efforts, in having the claims of the county established and allowed by the general government, he should be entitled to receive as a compensation for his services one-half of the lands, or the indemnity granted in lieu thereof.*"

This case *assumes* not only that the act of Congress in no way prohibits the power of the counties to make sales of swamp lands, but it also assumes that that act does not render unlawful a *compromise* by which the swamp lands were conveyed in settlement of a *doubtful question.*

In Page Co. *v.* Emigrant Co., 41 Iowa, 115, the same doctrine regarding the power of the county to make sales is repeated, and the case assumes that the act of Congress contains no limitation upon the power of sale.

In Mills Co. *v.* B. & M. R. R. Co., 47 Iowa, 66, being the case now before this court on writ of error, the Supreme Court of Iowa was not called upon to decide whether the swamp-land act rendered unlawful the compromise in the present case. They were only called upon to decide whether the laws of Iowa or the general principles of law rendered the *compromise* unlawful. What the court said in response to that is in the following words (pp. 70, 71):

"We next come to consider the question as to whether the county had power to make a compromise. That the county had such power, we think, was substantially held in Allen *v.* Cerro Gordo Co., 34 Iowa, 54, and in Grimes *v.* Hamilton Co., 37 Iowa, 298. In the latter case it was held that an action brought to recover for services in securing

the title to swamp lands might be compromised by the defendant county by a conveyance of a portion of the land.

"It is claimed, however, that where a county is a party to an action involving the question of title to swamp lands, the county has no power to compromise such an action. It is said that the county holds such land in trust, and that a trustee must assume the validity of the title to the trust property, and act accordingly. But a trustee in the exercise of a reasonable discretion may certainly compromise debts. Blue *v.* Marshall, 3 P. Wms., 381; Radcliff *v.* Wirch, 17 Bead., 216. And we have no doubt that in the exercise of such discretion he may compromise any action whatever. A municipal corporation may compromise claims. Augusta *v.* Leadbeater, 16 Me., 45; Bean *v.* Tay, 23 Me., 117; Petersburg *v.* Mappin, 14 Ill., 193.

"The general power of the county to compromise, even when a question of title to alleged swamp lands is involved, does not, indeed, seem to be very seriously denied by the counsel of the county. They insist mainly that such power could not be exercised under the peculiar circumstances of this case. Great stress is laid upon the fact that at the time of the compromise there had been an adjudication in favor of the county, not only by the district court, but by this court. So long, however, as the action was still pending, it was as much the proper subject of compromise as if no decision had been made."

And it is, we think, quite plain that this power, under this act of the 28th of September, 1860, of the states, and their grantees the counties, to make these sales is not fettered or restrained by any trust which the act of Congress attaches to the title or power of sale, as no such trust is thereby attached except that kind of political trust reposed in the good faith of the states which the courts do not enforce.

In Dunklin *v.* District Court, 23 Mo., 449, this question as to the nature of the trust created under this act of Congress came *directly* before the court. There the county brought mandamus to compel the District County Court to *vacate a certain order which directed alternate sections of said*

swamp land conveyed to Missouri by the act of Congress of the 28th of September, 1850, to be sold and conveyed to the Cairo & Fulton R. R. Co., in payment of the subscription to the capital stock of said company, &c. The claim there was that by the act of Congress "*a trust is fastened upon the lands so that they cannot be disposed of by the state for any other purpose*" than drainage (p. 456). To this claim the court replies in these words:

"This, however, is not correct. The trust reposed by the United States is in the state of Wisconsin; it is a personal trust in the public faith of the state and not a property trust fastened by the terms of the grant upon the land itself and following it into whose hands soever it may pass. * * * * * It is a matter *exclusively* in the control of the legislature. No private rights of property are invaded, and we have no authority to interfere in the execution of the trust. The grant of the sixteenth section in Michigan was to the state for the use of schools, and in Cooper *v.* Roberts, (18 How., 181,) the Supreme Court of the United States, speaking in reference to the validity of a sale of these lands made under the authority of the state without the consent of Congress, said: 'The trusts created by these compacts relate to a subject certainly of universal interest, *but of municipal concern, over which the power of the State is plenary and exclusive;* in the present instance the grant is to the state directly without limitation of its power, though there is a sacred obligation imposed on the public faith.'"

In Cooper *v.* Roberts, 18 How., 173, cited in two of the above cases, the words by which the trust in Sec. 16 was created are found in the act admitting Michigan into the Union, and are these (p. 179): "that every section 16 in every township of the public lands * * * shall be granted *to the state for the use of schools;*" and it is in regard to the trust created by these words this court makes the statement (18 How., 182) above quoted, to wit, that "trusts created by these compacts relate to subjects certainly of universal interest, *but of municipal concern, over which the*

power of the state is plenary and exclusive. In the present instance the grant is to the state directly, without limitation of its power, though there is a sacred obligation imposed on its public faith. We think it is competent for Michigan to sell the school reservations without the consent of Congress."

In Railroad *v.* Pennison, 18 Wall., 5, and especially in United States *v.* U. P. R. R. Co., 8 Otto, 569, it was strenuously urged that because the railroad had public duties imposed upon it by the law of its creation, had received donations of land and loans of money, and was required, in consideration of these grants of property, to make, keep in order, and use the road for great public purposes; therefore these laws and facts impressed as in favor of the United States, upon the property of this road, *trust* obligations cognizable in courts of equity and enforcible at suit of the United States as against this property and the company. But to this claim this court replied, in the former case, (18 Wall., 32,) thus: "The railroad and telegraph line are neither in whole nor in part the property of the government." And, in the latter case, to the allegation that the United States were, by said facts set up in the bill, shown to hold an enforcible trust in this property, the court replies, (8 Otto, 619): "We are not prepared to say that there are no trusts which the United States may not enforce in a court of equity against this company. When such a trust is shown it will be time enough to recognize it. But we are of opinion that *there is none set forth in this bill which under the statute authorizing this suit can be enforced in the Circuit Court.*"

What the bill sets forth is shown on pages 572, 579, and shows the large grants to the railroad of money and land, the large debts owing to the United States, and its obligations to carry &c.; that the coal lands and other property so granted were being "*diverted*" from the alleged trust on which they were received; and generally it disclosed every term of these grants and resulting obligations and trusts, and prayed (578) "that the grants by the United States be

declared to be held by the company for a public use, &c., and that the property granted by the United States, &c., to be a trust fund to secure the bonds lent by them, &c., and that the construction contracts and the land grant and income mortgages be declared void, &c."

The case was decided in this court on demurrer to said bill.

Although the fact that, in this case, the grant was to a *private corporation*, of lands to be devoted to a specific use, as designated in the Congressional grant, and the allegation was that certain contracts had been, in violation of the terms and alleged trusts of the statutory grant, made "diverting" this trust property to unlawful uses, may be claimed to distinguish this case from the one at bar, where the grant is to a *state*, yet we do not perceive that this difference tends to show that the grant to the *state* creates a judicially cognizable trust, whilst that to a *private corporation*, as set up in this bill, does not. To us this difference seems strongly to *strengthen* the view against the swamp lands being affected with a judicially cognizable trust; for the supremely important reason stated in the above-cited cases, to wit, that the swamp-land act expressly entrusts the whole matter of these lands "*to the disposal of the legislatures*" of the states.

We cannot see how it is possible that the swamp-land act, in devoting this grant to drainage, in the terms contained in that act, can be held to create a judicial trust, such as render this compromise void, and yet such contracts as are set out in this railroad case, (8 Otto, 572, '3, &c.,) where, for example, the coal lands granted by Congress for making and maintaining a great national highway for the primary uses of the United States, are alleged to be fraudulently "diverted" from the objects of said trust to the purely personal gain of the fraudulent managers, be held to be valid contracts so far as the terms of grant by Con-

gress is concerned—the act of Congress not affecting, by means of a trust or otherwise, the corporations's *absolute dominion* over the grant.

EMIGRANT COMPANY v. ADAMS COUNTY, 10 OTTO, 61.

In view of the judgment of this court in Emigrant Company *v.* County of Adams, (10 Otto, 61,) we apprehend that the court will regard the discussion of this question of trust out of place.

We have, notwithstanding this decision, deemed it proper to present the foregoing points simply because of what was by this court intimated, if not decided, in Emigrant Company against Wright county, (7 Otto, 339,) regarding the trust arising under the swamp-land act; and, further, because of the *qualified* manner in which, in the Adams county case, this court repudiates its "first impressions" as to said creation of a trust.

But we submit that, in any and every possible view of the matter, this Adams county case is conclusive of the present one, and rules it; because, even if it be conceded doubtful as to whether the swamp-land act does not create a trust which would render void this compromise, in case the trust were asserted by the United States—the donor of the property affected with the alleged trust—yet the Adams county case settles it that only the United States can set up this claim.

Hence Mills county has no standing here to set up the "claim," under section 709 Revised Statutes, that the swamp-land act creates a trust which this contract of compromise violates.

If this Adams county case can be said to have made—in its five grounds set up (see 10 Otto, 65) in its bill filed for avoiding the contracts and deeds of Adams county granting its swamp lands in consideration that the grantee, the Emigrant Company, would make certain *public improve-*

ments, &c.—the claim that this compromise violated a trust created by said swamp-land act, then, so far as relates to the questions here involved, the Adams county case, is in its essential facts, *identical* with the one at bar. It is from the same state, Iowa. It involves the same statues of Iowa and of the United States. The question it made was: Can the county make a valid contract "diverting" the lands to public improvements with the Emigrant Company?

And this court held, unanimously, that the county could do so.

The following from the syllabus, and also from the opinion of the court, shows just what the court decided:

"Though the grant by the act of Congress of September 28, 1850, (9 Stat., 519,) of the swamp and overflowed lands to the states in which they lie is declared to be made for the exclusive purpose of enabling the states, with the proceeds thereof, to reclaim the lands, by means of levees and drains, it is questionable whether the security for the due application of the proceeds does not *wholly* rest upon the good faith of the several states; and whether they may not exercise their discretion in this behalf without being liable to be called to an account, and without affecting the title to the lands; at all events, it seems that *Congress alone has the power*, in clear case of violation of the trust, to enforce the conditions of the grant, by revocation or otherwise; and since, by the act, the proceeds are to be applied to the designated purposes *only* '*as far as may be necessary*,' each state has, *at least*, a large discretion as to the necessity of employing the proceeds to the reclamation of the lands.

"2. A grant subject to the conditions of that act, made by a state of its swamp and overflowed lands to the several counties in which they are situated, to be disposed of for general county purposes, is valid, and the county which has disposed of them in pursuance of the state grant *cannot rescind its contract on the ground of its being a violation of an act of Congress*."

In its opinion the court says, upon the first of the above points, after saying that the court's "first impression" (as indicated in the Wright county case, 7 Otto, 339) was that the swamp-land act created a trust as to the lands which Iowa could not wholly "throw off," (p. 68,) proceeds to say:

"*But a reconsideration of the subject has brought us to an opposite conclusion.* The argument against the validity of the scheme is that it effects a *division* of the proceeds of the lands from the objects and purposes of the Congressional grant. These were declared to be to enable the state to reclaim the lands by levees and drains. The provision of the second section of the act of Congress declared that the proceeds of the lands, whether from sale or direct appropriation in kind, should be applied exclusively, as far as necessary, to these purposes. This language implies that the state was to have the *full power of disposition of the lands, and only gives direction as to the application of the proceeds, and of this application only as far as necessary to secure the object specified.* It is very questionable whether the security for the application of the proceeds thus pointed out does not rest upon the good faith of the state, and whether the state may not exercise its discretion in that behalf without being liable to be called to account, and without affecting the titles to the lands being disposed of. At all events it would seem that Congress *alone* has power to enforce the conditions of the grant, either by a revocation thereof or other suitable action, in a clear case of violation of the conditions. And as the application of the proceeds to the named objects is only prescribed 'as far as necessary,' room is left for the exercise by the state of a *large discretion* as to the extent of the necessity."

Then, on the point made in that case, (and which is not in this,) that the act prohibiting assignments of claims against the United States, was violated in the Wright county contract, because it undertook to assign to the emigrant company the indemnity moneys which Adams county was entitled to receive from the United States for swamp land proceeds in the treasury, the court says (p. 70): "After it" (the indemnity money) "was paid, the county being *par-*

ticeps criminis, cannot, as against its own act, *have a standing in a court of equity either to recover it from the appellants or to have the contract avoided.* So far as the state laws are concerned the Supreme Court of Iowa has frequently sustained contracts precisely like that under consideration. (See Audulow County *v.* American Emigrant Co., 40 Iowa, 460; Allen *v.* Cerro Gordo County, 34 Iowa, 54; Paige County *v.* American Emigrant Co., 41 Iowa, 115; Ringold County *v.* Allen, 42 Iowa, 697.)"

Now, this Adams county case decides the following things explicitly:

1. That Iowa, and its grantees, the counties, have no standing in the courts for the purpose of avoiding contracts "devoting" swamp lands to other purpose than drainage, on the ground that such "devoting" violates a trust attached, by the swamp-land act, to these lands; and that if there be such a trust Congress *alone* can set up the alleged violation of the trust.

2. That where such a swamp-land contract does, in fact, violate some act of Congress (as for example the one devoting the lands to drainage, or the one prohibiting the assignment of claims against the United States,) but the contract has been wholly *executed*, so that the county is *particeps criminis* and *in pari delicto*, then the county cannot sustain any bill to avoid its own executed contract. In this case cannot avoid its deeds under this compromise, but is estopped.

3. That there is, at the very most, no *want of power* in Iowa and its grantees to make this compromise, even if there be a trust in the case, because "each state has, *at least*, a large discretion as to the '*necessity*' of employing the proceeds for the reclamation of the lands; and the state having, in any case, (as in this,) exercised that *discretion*,

and conveyed these lands; and (if there be any violation of law or duty) being '*particeps criminis*,'" the state and county have no standing, but are estopped to assert the wrongful exercise of said discretion, and cannot maintain any bill like the present so far as the right to maintain it is affected by the acts of Congress.

4. The court more than intimates—it expressly asserts—(see top of page 69) that "A RECONSIDERATION HAS BROUGHT THE COURT TO AN OPPOSITE CONCLUSION" from the one stated at the bottom of page 68, to wit, that the swamp-land act created a trust in favor of their devotion to drainage which could be enforced against the states and counties by the courts.

So that the case of Adams county does, as we confidently submit, decide the present case.

For these reasons, and for those above given, we will not here discuss the merits of this case, so elaborately presented in the opposing brief, so far as these merits depend upon either the local laws of Iowa or the principles of general as distinguished from Federal law.

We cannot think that there is any possible view or contingency in which this court can *consider or decide* upon any of the alleged errors of the court below, in so far as these errors have their foundations in the laws of Iowa alone or in the general principles of law *alone*, as distinguished from acts of Congress.

We submit that the case must be dismissed for want of jurisdiction because there is here presented no Federal question.

If we are wrong in this, then the state court decided the Federal question properly, and the judgment of the state court must be affirmed.

SHELLABARGER & WILSON,
Of Counsel for Defendant.